The Facebook, Inc. v. Connectu, LLC et al Doc. 691

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE FACEBOOK, INC.,	)	CR-07-01389-JW
PLAINTIFF,	)	AUGUST 17, 2009
V.	)	
CONNECTU, INC., ET AL.,	)	PAGES 1 - 87
DEFENDANTS.	)	
______________________	)	

THE PROCEEDINGS WERE HELD BEFORE

THE HONORABLE UNITED STATES DISTRICT

JUDGE JAMES WARE

A P P E A R A N C E S:

FOR THE PLAINTIFF: ORRICK, HERRINGTON & SUTCLIFFE
BY: NEEL CHATTERJEE
1000 MARSH ROAD
MENLO PARK, CALIFORNIA 94025

FOR THE DEFENDANTS: HOGE, FENTON, JONES & APPEL
BY: JAMES E. TOWERY
ALISON P. BUCHANAN
60 SOUTH MARKET STREET
SUITE 1400
SAN JOSE, CALIFORNIA 95113

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

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A P P E A R A N C E S: (CONT'D)

FOR THE FOUNDERS:

BOIES, SCHILLER & FLEXNER
BY: DAVID A. BARRETT
575 LEXINGTON AVENUE
7TH FLOOR
NEW YORK, NEW YORK 10022

FINNEGAN, HENDERSON,
FARABOW, GARRETT & DUNNER
BY: SCOTT R. MOSKO
STANFORD RESEARCH PARK
3300 HILLVIEW AVENUE
PALO ALTO, CALIFORNIA 94304

SAN JOSE, CALIFORNIA AUGUST 17, 2009

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE COURT: VERY WELL. CALL THE MATTER.

THE CLERK: CALLING CASE NUMBER 07-1389, THE FACEBOOK, INC., VERSUS CONNECTU, INC., ET AL.

ON FOR HEARING ON NINTH CIRCUIT'S LIMITED REMAND AND MANDATE ON CONNECTU, INC.'S MOTION TO DISQUALIFY.

MR. TOWERY: GOOD MORNING, YOUR HONOR.

THE COURT: DO YOU WANT TO STEP FORWARD AND STATE YOUR APPEARANCES.

MR. TOWERY: GOOD MORNING, YOUR HONOR. JAMES TOWERY APPEARING ON BEHALF OF THE MOVING PARTY CONNECTU.

MR. CHATTERJEE: YOUR HONOR, NEEL CHATTERJEE REPRESENTING FACEBOOK AND MARK ZUCKERBERG.

MR. BARRETT: YOUR HONOR, DAVID BARRETT REPRESENTING THE FOUNDERS WINKLEVOSS AND NARENDRA.

MR. MOSKO: AND, YOUR HONOR, SCOTT MOSKO OF FINNEGAN ALSO REPRESENTING THE FOUNDERS.

MS. BUCHANAN: AND ALISON BUCHANAN ALSO FOR CONNECTU. GOOD MORNING, YOUR HONOR.

THE COURT: THANK YOU. PLEASE BE SEATED.

MY STAFF WAS ASKING ME BEFORE WE STARTED THIS HOW MUCH TIME I HAD ALLOWED, AND I ACTUALLY HAD NOT SET UP A TIME SCHEDULE FOR THIS.

I WAS IN THE PROCESS, QUITE FRANKLY, OF REVIEWING THE MOTIONS THAT ARE BEFORE THE COURT ON THE PAPERS AND HAD COME TO A DETERMINATION THAT IT MIGHT BE BENEFICIAL TO THE PARTIES TO HAVE A PERIOD OF TIME TO ADDRESS THE COURT.

AND SO I CAME UP WITH SOME QUESTIONS WHICH YOU RESPONDED TO IN WRITING, AND SO I DIDN'T THINK THAT WE WOULD NEED A LOT OF TIME THIS MORNING GIVEN THE NATURE OF THE RESPONSE, BUT IT DID LEAVE SOME QUESTIONS THAT I MIGHT WISH TO PUT TO YOU FURTHER TO THE QUESTIONS THAT I ASKED YOU TO RESPOND TO.

AND THEN I WANTED TO GIVE YOU AN OPPORTUNITY TO HIGHLIGHT ANYTHING FURTHER THAT YOU WOULD WISH TO DO.

IT SEEMS TO ME THAT WHAT I TOOK FROM THE PAPERS IS THAT THE FACTS OF THIS MATTER ARE NOT IN DISPUTE. THE MOTION RAISES ESSENTIALLY A LEGAL ISSUE BASED UPON THAT SET OF FACTS. AND IT ALSO SEEMED TO ME THAT THE LAW HAVING TO DO WITH THE ETHICS AND RESPONSIBILITIES OF LAWYERS DIDN'T VARY

MUCH BETWEEN AND AMONG THE VARIOUS JURISDICTIONS.

AND SO I FOUND IT HELPFUL TO READ CASES FROM MULTIPLE PLACES, BUT I WOULD WISH YOU TO TELL ME WHETHER OR NOT ANY OF YOU BELIEVE THAT I'M BOUND BY A PARTICULAR SET OF LEGAL PRINCIPLES HERE THAT WOULD NOT ALLOW ME TO LOOK AT CASES FROM OTHER JURISDICTIONS THAT GET CLOSE TO THIS FACT SITUATION. AND, QUITE FRANKLY, I HAVEN'T FOUND A PARALLEL FACTUAL SITUATION TO THIS ONE.

SO AGAIN, PERHAPS IF YOU WOULD IN YOUR COMMENTS DRAW ME AS CLOSELY AS YOU COULD TO A PARALLEL CASE THAT WOULD ADD AUTHORITY TO THE WAY YOU WOULD ASK THE COURT TO RULE.

IT IS THE CASE THAT THIS IS A MOTION MADE BEFORE THE NINTH CIRCUIT BY NEWLY APPOINTED COUNSEL AS I WILL CALL THEM FOR APPELLANT CONNECTU, AND SO I'LL CALL ON YOU FIRST TO ADDRESS THE COURT WITH RESPECT TO THIS MATTER.

MR. TOWERY: THANK YOU, YOUR HONOR.

FIRST I DREW THE INFERENCE FROM THE QUESTIONS THAT THE COURT PUT TO BOTH COUNSEL THAT ONE OF THE CORE MATTERS THAT THE COURT WAS LOOKING TO AS IT ASSESSED THIS MOTION WAS THE ACTUAL FACTUAL ADVERSITY, WHAT WERE THE POINTS OF ADVERSITY BETWEEN CONNECTU ON THE ONE HAND AND

FOUNDER'S COUNSEL ON THE OTHER.

AND HAVING LOOKED THROUGH ALL OF THE BRIEFS AND GIVEN THIS SOME THOUGHT AND THERE HAVE BEEN A FEW NEW FACTS THAT I'LL ALLUDE TO VERY BRIEFLY THAT HAVE OCCURRED OUTSIDE OF WHAT IS ALREADY BEFORE THE COURT, LET ME BEGIN AND TRY TO DESCRIBE TO THE COURT WHAT I BELIEVE TO BE THE CENTRAL POINTS OF ADVERSITY.

AND THE CORE ADVERSITY, OF COURSE, IS THAT ON THE QUESTION OF THIS COURT'S PRIOR RULINGS REGARDING THE ORDER THIS COURT MADE ENFORCING THE JUDGMENT, THE JUDGMENT THAT WAS ENTERED THEREON AND THE VARIOUS ANCILLARY ORDERS THAT THE COURT ISSUED THEREAFTER IN RESPONSE FROM THE CHALLENGES OF THE FOUNDERS, THERE'S A FUNDAMENTAL GULF BETWEEN CONNECTU ON THE ONE HAND AND THE FOUNDERS AND THEIR COUNSEL ON THE OTHER BECAUSE IT IS CONNECTU'S POSITION AS A NOW WHOLLY OWNED SUBSIDIARY OF FACEBOOK THAT THIS COURT'S RULINGS SHOULD BE AFFIRMED AND THAT THE MATTERS SHOULD BE LEFT WHERE THEY ARE.

WHEREAS ON THE OTHER HAND FOUNDERS THROUGH THEIR COUNSEL, CONNECTU'S FORMER COUNSEL HAVE BEEN ASSERTING PRECISELY THE OPPOSITE, THAT THEY WANT THIS COURT'S RULINGS OVERTURNED AND

RETURNED TO THE STATUS QUO ANTE.

AND FROM THAT FUNDAMENTAL DIFFERENCE THERE FLOW A NUMBER OF DIRECT POINTS OF ADVERSITY. THE FIRST AND FOREMOST ONE IS ON CONNECTU'S MOTION TO DISMISS THE APPEAL WHERE NOT ONLY DO WE HAVE A DIFFERENCE OF OPINION WHERE CONNECTU IS TAKING THE POSITION THAT BECAUSE OF THE SETTLEMENT WITH FACEBOOK THAT THERE'S NO LONGER ANY NEED FOR CONNECTU TO BE -- TO MAINTAIN THE APPEAL THAT WAS FILED PREVIOUSLY ON ITS BEHALF. AND THE FOUNDERS OBVIOUSLY TAKE THE OPPOSITE POSITION.

BUT IT HAS GONE TO THE EXTRAORDINARY LENGTH OF FOUNDER'S COUNSEL, FACEBOOK'S -- EXCUSE ME -- CONNECTU'S FORMER COUNSEL, MR. UNDERHILL, MAKING THE THREAT THAT HE DID IN HIS E-MAIL OF DECEMBER 18TH, TO ME REGARDING ANY ACTION BY CONNECTU TO DISMISS THE APPEAL BEING ACTIONABLE.

AND THAT IS QUITE, JUST IN THE CONTEXT OF LEGAL ETHICS, YOUR HONOR, I FIND THAT INCIDENT TO BE A REMARKABLE ILLUSTRATION OF THE ADVERSITY HERE TO HAVE THE FORMER COUNSEL FOR FACEBOOK -- EXCUSE ME -- FOR CONNECTU, MAKING A THREAT TO CONNECTU, THAT CONNECTU TAKES A CERTAIN POSITION THAT FORMER COUNSEL WOULD FIND IT TO BE ACTIONABLE.

ABOVE AND BEYOND THAT, THERE ARE OTHER

FUNDAMENTAL ISSUES THAT GO TO THE MERITS HERE. OBVIOUSLY CONNECTU HAS NOT BEEN REQUIRED YET TO TAKE A POSITION ON THE APPEAL ON THE MERITS BECAUSE THE BRIEFING HAS BEEN DELAYED DUE TO THE VARIOUS MOTIONS THAT HAVE BEEN FILED BY VARIOUS PARTIES.

BUT IN CONNECTU'S STATUS AS A WHOLLY OWNED SUBSIDIARY OF FACEBOOK, CONNECTU OBVIOUSLY RESERVES THE RIGHT AND INDEED IS LIKELY TO JOIN IN FACEBOOK'S POSITION ON APPEAL AND IN DIRECT ADVERSITY TO THE FOUNDERS AND THEIR COUNSEL.

THE COURT: LET ME STAY WITH THIS PART OF THE STATUS FOR A MOMENT.

AS I UNDERSTAND THE NATURE OF THE ORIGINAL APPEAL BY APPELLANT CONNECTU AND APPELLANT THE FOUNDERS, THEY JOINTLY SOUGHT TO REVERSE THE DECISION OF THIS COURT. AND SO FAR AS I UNDERSTAND IT, THAT IS THE CURRENT POSITION THAT THEY HAVE TAKEN FORMALLY ON APPEAL.

THERE'S BEEN NO CHANGE IN THE BRIEFING. THERE'S BEEN NO WITHDRAWAL OF THE BRIEFING AND SO NOR -- HAS A MOTION BEEN FILED BY APPELLANT CONNECTU BEFORE THE NINTH CIRCUIT TO WITHDRAW ITS APPEAL?

MR. TOWERY: YES, YOUR HONOR.

THE COURT: SO A MOTION TO WITHDRAW ITS

APPEAL IS NOW PENDING?

MR. TOWERY: THAT IS CORRECT. THAT IS ONE OF THE MOTIONS PENDING BEFORE THE NINTH CIRCUIT.

THE COURT: AND IS THAT THE SAME AS A MOTION TO DISMISS ITS APPEAL?

MR. TOWERY: IT IS STYLED AS A MOTION TO DISMISS THE APPEAL. I MAY HAVE MISUNDERSTOOD THE COURT'S QUESTION.

THE COURT: WELL, IT COULD BE THAT THERE WAS A DISTINCTION BETWEEN WITHDRAWING THE APPEAL AND DISMISSING THE APPEAL BUT -- SO IT'S STYLED AS A MOTION TO DISMISS ITS APPEAL?

MR. TOWERY: THAT'S CORRECT, THERE'S NO SEPARATE MOTION TO WITHDRAW ANY BRIEF. THERE'S JUST SIMPLY CONNECTU'S MOTION TO DISMISS THE APPEAL ON BEHALF OF CONNECTU.

THE COURT: ALL RIGHT. NOW, THAT IS -- BUT THERE'S NO CURRENT MOTION BY CONNECTU OR FACEBOOK THAT SPEAKS TO THE EFFECT OF A DISMISSAL OF THE APPEAL BY CONNECTU ON THE RIGHT OF THE FOUNDERS TO CONTINUE WITH THEIR APPEAL? THAT'S NOT BEFORE THE NINTH CIRCUIT AS OF YET, OR IS IT?

MR. TOWERY: YOUR HONOR, MR. CHATTERJEE IS PROBABLY BETTER SITUATED TO ANSWER THAT QUESTION

WITH RESPECT TO WHAT FACEBOOK'S ALLEGATIONS ARE.

THE COURT: WELL, I'M JUST ASKING IN TERMS OF MOTIONS. THERE'S BEEN NO MOTION OR CONTENTION MADE TO THE NINTH CIRCUIT WITH RESPECT TO THAT?

MR. TOWERY: I BELIEVE --

MR. CHATTERJEE: YOUR HONOR, I'M HAPPY TO ANSWER THE QUESTION. YOU MIGHT RECALL, YOUR HONOR, FROM THE PREVIOUS PROCEEDINGS THAT THERE WAS A SET OF ISSUES ABOUT WHETHER THE FOUNDERS HAD WAIVED THEIR RIGHTS IN THE EARLIER PROCEEDINGS BECAUSE THEY CHOSE NOT TO APPEAR IN MANY OF THE PROCEEDINGS WHILE MR. BARRETT'S FIRM WAS ONLY REPRESENTING CONNECTU AND AT THE VERY END THE INDIVIDUALS INTERVENED AND TRIED TO BECOME PART OF THE CASE.

THERE IS A MOTION AT THE NINTH CIRCUIT TO DISMISS THEIR APPEAL DUE TO WAIVER BECAUSE THEY CHOSE NOT TO OPPOSE THE MOTION TO ENFORCE THAT WAS BROUGHT BY FACEBOOK AND CONNECTU.

IT'S IN MANY WAYS A SEPARATE SET OF ISSUES THAT IS BETWEEN FACEBOOK AND THE FOUNDERS, BUT OBVIOUSLY ALL OF THE APPEAL ISSUES ARE CONCURRENTLY PENDING.

THE COURT: THANK YOU. NOW, LET ME -- I DON'T MEAN TO CHANGE TOO DRASTICALLY FROM THE

MOTION BY "NEW CONNECTU" AS I'LL CALL IT.

IS IT THE UNDERSTANDING OF NEW CONNECTU THAT IF THE FOUNDERS ARE SUCCESSFUL ON THE APPEAL THAT AMONG THE REMEDIES THAT THE APPELLATE COURT COULD GIVE WOULD BE TO RETURN TO THE STATUS QUO ANTE, THAT IS, WHERE NEW CONNECTU'S STOCK WOULD RETURN TO THE FOUNDERS AND IT WOULD BE IN A POSITION WHERE IT WOULD NOW BE OWNED BY THE FOUNDERS AND RESTORED TO THE POSITION OF PROCEEDING WITH ITS LITIGATION?

MR. TOWERY: YOUR HONOR, MY UNDERSTANDING IS THAT THAT IS AMONG THE RELIEF THAT THE FOUNDERS ARE SEEKING. THE FOUNDER'S COUNSEL CAN OBVIOUSLY SPEAK TO IT MORE AUTHORITATIVELY, BUT THE SHORT ANSWER TO YOUR QUESTION IS, YES, I BELIEVE THAT IS AMONG THE BELIEF SOUGHT BY FOUNDERS.

THE COURT: NOW, IF THAT IS A VIABLE REMEDY THAT IS BEFORE THE COURT, SHOULDN'T I REGARD NEW CONNECTU IN ITS CURRENT STATUS AS INCHOATE IN SOME RESPECTS, THAT ALTHOUGH THERE'S BEEN AN EXECUTION OF THE JUDGMENT, IT'S ALMOST IN A CONSTRUCTIVE TRUST? IT'S AS THOUGH THERE WAS A MONEY JUDGMENT, MONEY HAS BEEN PAID BUT ON APPEAL THAT MONEY WOULD HAVE TO BE RETURNED AND WHOEVER HAS THE MONEY CAN'T SIMPLY DISSIPATE IT, SPEND IT.

THAT WHILE THE APPEAL IS PENDING, OWNERSHIP IS IN CONTENTION.

MR. CHATTERJEE: YOUR HONOR, THIS WAS AN ISSUE, IF I MAY --

MR. TOWERY: PLEASE.

MR. CHATTERJEE: YOUR HONOR, THIS WAS AN ISSUE THAT WAS RAISED IN THE PREVIOUS MOTION TO ENFORCE PROCEEDINGS.

AND AS I READ YOUR HONOR'S ORDER, THAT WOULD FRUSTRATE YOUR HONOR'S ENTIRE PURPOSE OF HONORING THE SETTLEMENT AGREEMENT IN THE RESPECT THAT THE SETTLEMENT AGREEMENT THE OBJECTIVE WAS TO GIVE FACEBOOK OWNERSHIP OVER CONNECTU.

IF ALL OF A SUDDEN, THE COURT -- THEY ASKED ACTUALLY TO PUT SOME THINGS IN A CONSTRUCTIVE TRUST OR OTHER SORTS OF SUPERVISED COURT OWNERSHIP, AND THAT WAS REJECTED.

THE COURT: I'M WITH YOU WITH RESPECT TO EXECUTION OF THE JUDGMENT. THE JUDGMENT HAS BEEN EXECUTED. OWNERSHIP HAS BEEN CHANGED.

BUT MY QUESTION IS UNLESS THE -- WHILE THE APPEAL IS PENDING WITH THE POSSIBILITY OF A REVERSAL, SHOULDN'T THIS COURT ON THIS MOTION HAVE IN MIND THAT WHATEVER POSITION NEW CONNECTU TAKES, IT TAKES AS THE TARGET OF THE APPEAL?

IT MAY END UP BEING PLACED BACK WITH THE FOUNDERS OR IT MAY BE CONFIRMED WITH FACEBOOK. THAT IS THE ISSUE THAT IS GOING TO BE DECIDED BY THE APPELLATE COURT.

AND AS LONG AS THAT IS AN ISSUE BEFORE THE APPELLATE COURT, I HAVE TO TAKE THAT INTO CONSIDERATION IN DETERMINING THE POSITION OF NEW CONNECTU.

IT MAY WELL TAKE A POSITION TO DISMISS ITS OWN APPEAL, BUT IT -- UNLESS THERE'S A LEGAL REASON WHY THE FOUNDERS WOULD NOT BE ABLE TO PROCEED, IT WOULD REMAIN IN A POSITION WHERE ITS OWNERSHIP STATUS COULD CHANGE AS A RESULT OF THE APPEAL.

MR. TOWERY: WELL, YOUR HONOR, LET ME SAY SEVERAL THINGS ABOUT IT.

I MEAN, IF THE QUESTION IS FRAMED "SHOULD YOU TAKE THIS INTO CONSIDERATION?" I CAN EXCEED TO THAT, YES, IT IS ONE OF MANY FACTORS THAT YOU SHOULD TAKE INTO CONSIDERATION.

BUT WHAT DOES "TAKE INTO CONSIDERATION" MEAN? THE FOUNDERS FOUGHT HARD AGAINST THE IMPLEMENTATION OF THIS COURT'S ORDER. THEY FILED NUMEROUS MOTIONS TO STAY, FOUR SEPARATE MOTIONS TO STAY BEFORE THE NINTH CIRCUIT, ALL OF WHICH WERE

DENIED. THEY SOUGHT STAYS FROM THE TRIAL COURT, WHICH THE TRIAL COURT DENIED.

AND I WOULD RESPECTFULLY DISSENT THAT TAKING IT INTO CONSIDERATION SHOULD MEAN THAT CONNECTU IS FROZEN AND DOES NOT GET TO EXERCISE ITS LEGAL RIGHTS, DOES NOT GET TO MOVE FORWARD WITH WHATEVER BUSINESS PLAN IT CHOOSES TO MOVE, DOES NOT GET TO RECEIVE THE RIGHTS TO WHICH IT IS ENTITLED AS A CLIENT OR FORMER CLIENT OF THESE COUNSEL BASED UPON A SPECULATIVE POSSIBLE OUTCOME AT THE END OF THE NINTH CIRCUIT'S APPEAL PROCESS.

THEY SOUGHT A STAY. THEY FAILED.

SO FROM MY POINT OF VIEW CONNECTU IS A PROPERLY ORGANIZED CORPORATE ENTITY. IT IS PURSUING ITS RIGHTS LEGALLY, SEEKING A MOTION TO DISMISS THE APPEAL, AND IT IS SEEKING TO GET ITS FILES, AND IT IS SEEKING TO DEMAND FROM ITS VIEW, ITS CURRENT COUNSEL OR FORMER COUNSEL, UNDER EITHER CIRCUMSTANCE, THE BASIC RIGHTS OF CONFIDENTIALITY AND LOYALTY THAT IT'S ENTITLED TO, THAT ALL CLIENTS ARE ENTITLED TO.

AND I WOULD HOPE THAT THE COURT WOULD NOT THINK THAT THAT POSSIBLE OUTCOME, WHATEVER THE PROBABILITY OF IT IS, IS A REASON TO MEAN THAT CONNECTU SHOULD BE DENIED ALL OF THOSE RIGHTS

DURING THIS INDEFINITE PROCESS THAT THE APPEAL WAS PENDING. THERE'S NO PRECEDENT FOR DENYING THE CLAIMANT'S RIGHTS FOR THIS PERIOD OF TIME.

THE COURT: AND THAT PROMPTS MY QUESTION. AS I READ THROUGH THE CASES, I DIDN'T FIND A CASE THAT HAD THIS KIND OF A SITUATION.

THERE WERE LOTS OF MERGERS AND ACQUISITIONS AND CHANGES OF OWNERSHIP, BUT NONE OF THE CASES INVOLVED A SITUATION WHERE THE POST-MERGER ISSUE WAS WHETHER TO UNDO THE MERGER.

IT WAS ALL DAMAGES ACTIONS OR ACTIONS HAVING TO DO WITH ENFORCEMENT OF THE MERGER AS OPPOSED TO AN APPEAL WHERE THERE WAS A REQUEST TO UNDO THE TRANSACTION AND TAKE THE PARTIES BACK TO THE STATUS QUO ANTE AND THE DISQUALIFICATION MOTION WAS BEING CONSIDERED IN THE LIGHT OF THAT REMEDY.

DO YOU AGREE?

MR. TOWERY: I DO AGREE, YOUR HONOR. BASED ON OUR LEGAL RESEARCH THIS IS A CASE OF FIRST IMPRESSION. WE HAVE BEEN UNABLE TO FIND ANY OTHER CASE IN THE NINTH CIRCUIT OR IN ANY OTHER CIRCUIT WHERE THE CLIENT CHANGING HANDS WAS THE SUBJECT OF AN APPELLATE PROCESS WHERE THERE WAS A THEORETICAL POSSIBILITY OF THE RETURN TO STATUS QUO ANTE.

BUT THAT CUTS IN BOTH DIRECTIONS, YOUR

HONOR. ONE IMPLICATION OF THAT IS THAT THERE IS ABSOLUTELY NO PRECEDENT FOR WHAT THE FOUNDER'S COUNSEL ARE ASKING YOU TO DO, WHICH IS BASICALLY TO HOLD IN ABEYANCE CONNECTU'S RIGHTS TO ENFORCE THE OBLIGATIONS OF ITS FORMER COUNSEL.

I MEAN, IF THIS COURT WERE TO MAKE THAT RULING, IF THIS COURT WERE TO SAY THAT THE NORMAL RULES OF DISQUALIFICATION OF COUNSEL AND DUTIES OF LOYALTY AND DUTIES OF CONFIDENTIALITY ARE INAPPLICABLE IN THIS CIRCUMSTANCE BECAUSE OF THAT POTENTIAL OUTCOME FROM THE APPEAL, THAT WOULD BE AN UNPRECEDENTED RULING.

THE COURT: AND I'M NOT THERE YET, BUT THERE ARE TWO MOTIONS.

AND SO WOULD YOU AGREE THAT I SHOULD CONSIDER THE MOTION FOR DISQUALIFICATION IN A DIFFERENT LIGHT THAN THE MOTION FOR THE TURN OVER OF DOCUMENTS BASED UPON THE APPEAL SEEKING TO REVERSE THE TRANSFER OF OWNERSHIP?

MR. TOWERY: UM, LET ME BE AS MEASURED AS I CAN IN MY RESPONSE.

I HAVE GIVEN A LOT OF THOUGHT TO THE FILE ISSUE. I SAW THE COURT'S QUESTION REGARDING THE DIVISION OF FILES AND THE ANSWER TO THAT OBVIOUSLY FROM CONNECTU'S PERSPECTIVE IS THAT WE DON'T HAVE

HOW THE FILES ARE KEPT BECAUSE NOBODY HAS TOLD US HOW THE FILES ARE KEPT. WE HAVEN'T HAD ACCESS TO THEM. SO WE'RE NOT IN A POSITION TO BE ABLE TO ANSWER THE COURT'S QUESTION.

AND THE RESPONSE FROM FOUNDER'S COUNSEL TO THAT QUESTION ABOUT THE MAINTENANCE OF THE FILE OR THE DIVISION OF THE FILE WAS NOT COMPLETELY CLEAR TO ME IN ANY EVENT.

THEY SEEMED TO BE SAYING THAT THEY PRIMARILY HAD LITIGATION FILES BUT THAT THEY HAVE ALSO HAD SOME CORPORATE DOCUMENTS, CORPORATE DOCUMENTS WHICH WE DON'T HAVE, WHICH WE HAVE ASKED FOR AND HAVE NOT BEEN ABLE TO OBTAIN.

AND I WILL ALSO REPRESENT TO THE COURT THAT WE HAVE HAD COMMUNICATIONS WITH THE JONES DAY LAW FIRM, WHICH HAS BEEN THE CORPORATE COUNSEL FOR CONNECTU, AND MADE THE REQUEST FOR ALL OF THOSE CORPORATE FILES FROM JONES DAY.

AND THE RESPONSE FROM THE JONES DAY PARTNER WAS SINCE THEY WERE DISPUTING CLAIMS TO THIS FROM FOUNDER'S COUNSEL AND FROM US AS THE NEW COUNSEL FOR CONNECTU, THEY WOULD RESPOND TO A COURT ORDER AND WE'RE NOT GOING TO TURN OVER THE FILES TO ANYBODY.

SO WE REMAIN FRUSTRATED EVEN IN OUR

ABILITY TO GET THE BASIC CORPORATE FILES FOR THE ENTITY THAT WAS TRANSFERRED AS PART OF THE SETTLEMENT ON DECEMBER 15TH.

BUT, YOUR HONOR, IN DIRECT RESPONSE TO YOUR QUESTION, YES, I BELIEVE THAT THERE IS A VALID DISTINCTION THAT THE COURT CAN DRAW ON THE FILES ISSUE BETWEEN FILES THAT ARE RELATED TO THE LITIGATION, RELATED TO THE DISPUTED TRANSACTION ON THE ONE HAND AND ALL OF THE BUSINESS FILES ON THE OTHER.

AND WHILE WE BELIEVE ON BEHALF OF CONNECTU THAT WE SHOULD BE ENTITLED TO ALL OF THE FILES, I HAVE SEEN IN THE CASES SOME REFERENCE TO THE TEKNI-PLEX OPINION IN PARTICULAR IN KEEPING OUT FROM THE PRODUCTION TO SUCCESSOR COUNSEL ATTORNEY-CLIENT PRIVILEGE DOCUMENTS RELATED TO THE TRANSACTION AND DISPUTE ITSELF.

AND IF THE COURT WERE TO GIVE US HALF A LOAF AND GIVE US ACCESS TO THE BUSINESS FILES, THAT WOULD BE A MAJOR STEP FORWARD AND IT WOULD BE A LEGITIMATE DISTINCTION FOR THE COURT TO MAKE IF THAT IS RESPONSIVE TO THE COURT'S QUESTION.

THE COURT: ALL RIGHT. AND HOW ABOUT ON THE DISQUALIFICATION SIDE, SHOULD THAT MAKE A DIFFERENCE, THE APPEAL, THE NATURE OF THE APPEAL

MAKE A DIFFERENCE WITH RESPECT TO WHETHER THE COURT SHOULD GRANT OR DENY A MOTION TO DISQUALIFY FORMER COUNSEL WHEN THE FOUNDERS ARE SEEKING TO RETURN THE COMPANY THAT WAS TRANSFERRED BACK TO THEM?

MR. TOWERY: I UNDERSTAND THE COURT'S QUESTION, AND I WOULD RESPECTFULLY SAY, NO, IT SHOULDN'T MAKE A DIFFERENCE BECAUSE IF YOU WERE TO DECIDE OTHERWISE, IF YOU WERE TO DECIDE THAT FOUNDERS'S COUNSEL SHOULD BE ABLE TO REMAIN IN THIS LITIGATION BECAUSE OF THAT POTENTIAL THAT THE OUTCOME OF THE APPEAL MIGHT INVOLVE A RETURN TO THE STATUS QUO ANTE, IT WOULD BE AN UNPRECEDENTED OPINION IN THE FIELD OF PROFESSIONAL RESPONSIBILITY.

THERE'S JUST NO OPINION THAT I HAVE EVER SEEN THAT SAYS THAT COUNSEL GETS TO TAKE A DIRECTLY ADVERSE POSITION TO EITHER ITS CURRENT JOINT CLIENT OR ITS FORMER JOINT CLIENT BECAUSE OF THE EXISTENCE OF AN APPEAL.

AND, YOUR HONOR, LET ME ADD TO THIS FROM A PROFESSIONAL RESPONSIBILITY PERSPECTIVE. ONE OF THE CLEAR DIFFERENCES BETWEEN THE TWO SIDES HERE AS WE HAVE FRAMED THESE ISSUES IS THAT FOUNDER'S COUNSEL IS ASKING THE COURT TO TAKE A RETROSPECTIVE LOOK AT WHAT HAS HAPPENED. SO THEY HAVE ARGUED, FOR EXAMPLE, THAT AFTER THEY RECEIVED THE WRITTEN NOTICE FROM ME IN DECEMBER THAT THEY WERE NOT TO SPEAK ON BEHALF OF CONNECTU, THAT THEY FOLLOW THAT.

THEY'RE SAYING THAT THEY HAVEN'T BREACHED ANY CONFIDENCES, THEY HAVEN'T ACTUALLY SINCE DECEMBER TAKEN ANY POSITIONS THAT ARE ADVERSE.

THAT'S NOT THE TEST, AND IT'S NEVER BEEN THE TEST. AND AMONG OTHER CASES THAT SAY THAT'S NOT THE TEST ARE THE AMERICAN AIRLINES VERSUS SHEPPARD MULLIN CASE IN CALIFORNIA AND THE BRENNAN'S CASE FROM THE FIFTH CIRCUIT. AND BOTH OF THOSE CASES CLEARLY SAY IT'S THE POTENTIAL. YOU MEASURE THIS AT THE OUTSET. YOU MEASURE IT PROSPECTIVELY NOT RETROSPECTIVELY WHAT THE DUTIES ARE OF COUNSEL.

AND IF THERE IS A THREAT -- LET ME BACK UP. THIS IS JUST A FUNDAMENTAL POINT OF ETHICS. IF A LAWYER DECIDES TO UNDERTAKE JOINT REPRESENTATION OF TWO CLIENTS, ONE OF THE IMPLICATIONS OF THAT IS THAT THAT LAWYER IS GIVING UP THE RIGHT TO EVER IN THE FUTURE REPRESENT ONE OF THOSE JOINT CLIENTS AGAINST THE OTHER JOINT CLIENTS, AND THAT'S EXACTLY WHAT HAPPENED HERE.

AND I WOULD SUBMIT THAT THIS WAS COMPLETELY FORESEEABLE ON THE PART OF FOUNDER'S

COUNSEL AS SOON AS THAT TERM SHEET WAS SIGNED THAT TRANSFERRED CONTROL OF CONNECTU TO FACEBOOK AS PART OF THE SETTLEMENT.

SO TO COME BACK TO THE COURT'S QUESTION, I THINK THAT YOU WOULD BE MAKING A MAJOR BREACH OF THE ACCEPTED LAW OF PROFESSIONAL ETHICS BY MAKING SUCH A RULING.

THE COURT: ALL RIGHT. LET ME SEE IF I CAN MAKE YOUR ARGUMENT MORE SPECIFIC AND HELPFUL TO ME. AND THAT IS, IS THE RULE AGAINST REPRESENTING A FORMER CO-CLIENT AGAINST ANOTHER FORMER CO-CLIENT ABSOLUTE OR DOES IT DEPEND UPON WHETHER OR NOT THE ATTORNEY WILL BE USING AGAINST THE FORMER CO-CLIENT CONFIDENTIAL INFORMATION WHICH WAS SHARED BY THE FORMER CO-CLIENT IN A CIRCUMSTANCE WHICH THAT FORMER CO-CLIENT EXPECTED WOULD NOT BE USED AGAINST IT?

I'VE HAD A GREAT DEAL OF DIFFICULTY AS I READ THROUGH THE CASES TRYING TO DETERMINE THE RULE, THE PRECISE RULE THAT APPLIES TO THIS CIRCUMSTANCE AND YOU WOULD BE VERY HELPFUL TO THE COURT TO GIVE ME THE RULE THAT YOU WOULD CITE TO THE COURT AS THE ONE THAT SHOULD BE ADOPTED AS THE LAW OF THE LAND.

IF YOU SAY THIS IS A CASE OF FIRST

IMPRESSION, FROM NOW ON ANY ATTORNEY TAKING ON A CASE WHERE THE ATTORNEY REPRESENTS TWO CLIENTS IN A BUSINESS TRANSACTION WHERE SHAREHOLDERS AND THE COMPANY ARE BEING TRANSFERRED AND LATER ON THERE IS AN ATTEMPT TO REST CONTROL OF THAT COMPANY BACK TO THE FOUNDERS BECAUSE OF WHAT IS ALLEGED TO BE FRAUD, WHEN MUST THE ATTORNEYS RECUSE THEMSELVES IF THERE IS AN EXECUTION OF THE JUDGMENT OR WHEN MAY THEY NO LONGER REPRESENT THE SHAREHOLDERS IN THAT EFFORT TO RETURN CONTROL OF THE COMPANY BACK TO THEM?

WHAT IS THE RULE?

MR. TOWERY: WELL, FIRST OF ALL, I APPRECIATE THE COURT'S HELP IN TRYING TO FOCUS THIS SO THAT IT'S HELPFUL TO THE COURT. THAT'S MY DESIRE.

LET ME START OUT BY SAYING THAT THERE ARE TWO APPROACHES THAT I HAVE SEEN IN THE CASES TO THIS ISSUE. ONE APPROACH IS SOMETIMES REFERRED TO AS THE COMMUNITY OF INTEREST APPROACH AND IT'S REPRESENTED BY THE BASS'S PUBLISHING CASE. THAT'S ONE OF THE CASES UPON WHICH FOUNDER'S REPLY CITED IN THEIR BRIEF.

THE MORE CUSTOMARY OR TRADITIONAL RULE IS REPRESENTED I BELIEVE BY THE BRENNAN'S RESTAURANT

CASE AS WELL AS ANY CASE.

AND LET ME JUST DESCRIBE THE DIFFERENCES BETWEEN THESE TWO APPROACHES AND WHY I BELIEVE THE TRADITIONAL APPROACH IS THE PREFERRED APPROACH AND WHAT THAT MEANS IN TERMS OF TRYING TO ARTICULATE WHAT THE RULE OUGHT TO BE THAT THE COURT IS ASKING ABOUT.

FIRST OF ALL, THE COMMUNITY OF INTEREST APPROACH THAT IS REPRESENTED BY THE BASS PUBLISHING OPINION IS A LOOSER STANDARD, A MORE RELAXED STANDARD AS I READ THE OPINION THAT BASICALLY SAYS THAT LET'S LOOK AT THE ACTUALITY OF THE INFORMATION THAT THEY HAD, THE EXPECTATIONS OF CONFIDENTIALITY.

LET'S LOOK AT WHAT ACTUALLY HAPPENED IN TERMS OF WHETHER THERE WERE ANY BREACHES AND THEN LET'S DETERMINE WHETHER THE LAWYERS OUGHT TO BE DISQUALIFIED BASED ON THAT.

IT IS WORTH NOTING THAT THE BASS PUBLISHING CASE IS NOT A REPORTING CASE. IT IS WORTH NOTING THAT IT WAS A, I BELIEVE, A 1994 OPINION OF THE COURT IN NEW YORK AND THAT WAS FOLLOWED TWO YEARS LATER BY THE TEKNI-PLEX OPINION FROM THE NEW YORK COURT OF APPEALS, THE HIGHEST COURT IN NEW YORK, WHICH SAID FAIRLY DEFINITIVELY THAT WHEN THERE'S A CHANGE IN OWNERSHIP OR CONTROL

THE RIGHT TO THAT TRANSFERS TO THE NEW ENTITY TO EXERCISE THE CONFIDENTIALITY QUESTIONS, THE PRIVILEGE QUESTIONS TO INSTRUCT COUNSEL ABOUT THOSE AND SO FORTH, WHICH IS CONSISTENT ALSO WITH THE U.S. SUPREME COURT OPINION IN THE WINTHROP CASE THAT IN THE BANKRUPTCY CONTEXT THAT A CHANGE OF CONTROL CARRIES WITH IT THAT THE SUCCESSOR CORPORATION HAS THE RIGHT TO DETERMINE WHETHER TO CLAIM PRIVILEGE, WAIVE PRIVILEGE, MAINTAIN CONFIDENTIALITY, ET CETERA.

SO BASS PUBLISHING IS AN UNREPORTED CASE THAT I THINK WAS, YOU KNOW, SUB SILENTIO CHALLENGED OR CHANGED BY THE TEKNI-PLEX CASE TWO YEARS LATER AND THAT LOOSE COMMUNITY OF INTEREST STANDARD DOES NOT FIND SUPPORT THAT I HAVE BEEN ABLE TO FIND IN ANY NINTH CIRCUIT CASE, IN ANY FIRST CIRCUIT CASES SO FAR AS THE FIRST CIRCUIT IS INVOLVED IN THIS CASE.

SO I THINK IT'S AN OUTLIER OF A JUDICIAL OPINION AND SHOULD NOT SERVE AS A FOUNDATION FOR THE COURT'S OPINION.

NOW, LET ME COME BACK TO THE CORE QUESTION THAT THE COURT WAS ASKING, WHAT OUGHT TO BE THE RULE? WHAT OUGHT TO BE THE POINT IN TIME?

I THINK THAT -- I MEAN, FIRST OF ALL,

LET'S ALL ACKNOWLEDGE AS WE ALREADY HAVE THAT THERE'S NO CASE THAT ARTICULATES WHAT THE RULE IS IN THE CONTEXT OF AN APPEAL PENDING THAT MAY CHANGE THE PLAYING FIELD.

THERE'S NO CASE ON EITHER SIDE ON THAT. BUT WITH RESPECT TO WHAT THE RULE OUGHT TO BE, I WOULD SUBMIT, YOUR HONOR, THAT THE RULE OUGHT TO BE AS REPRESENTED BY THE OPINION IN THE BRENNAN'S RESTAURANT CASE THAT WHEN A LAWYER UNDERTAKES TO REPRESENT JOINT CLIENTS, THERE IS JUST AN AUTOMATIC PRECLUSION FROM THAT LAWYER EVER SEEKING TO REPRESENT ONE FORMER JOINT CLIENT AGAINST ANOTHER JOINT CLIENT.

AND THAT'S GOT A VERY SOUND BASIS. AND I WOULD POINT OUT, YOUR HONOR, WE SHOULDN'T MUDDY THE WATERS HERE. ALTHOUGH COUNSEL HAS -- OPPOSING COUNSEL HAS TRIED TO SAY THAT THIS IS ALL ABOUT CONFIDENTIALITY. IT'S ACTUALLY ABOUT TWO FACTORS. IT'S ABOUT CONFIDENTIALITY AND LOYALTY.

AND WE SHOULD NOT BE FORGETFUL OF THE LOYALTY ASPECT. CONNECTU IS ENTITLED TO A DUTY OF LOYALTY FROM ITS FORMER COUNSEL. AND ONE OF THAT IS THAT THEY'LL NOT BE SUED, AND THIS DOESN'T EVEN GET TO THE SUBSTANTIAL RELATIONSHIP TEST BECAUSE AS WE POINTED OUT OVER AND OVER AGAIN, THIS ISN'T EVEN

A QUESTION OF SUBSTANTIAL RELATIONSHIP SINCE IT'S THE SAME ACTION. IT'S NOT SUCCESSIVE ACTIONS OR INDEPENDENT ACTIONS. IT'S THE SAME ACTION WHERE FORMER COUNSEL IS SEEKING TO TAKE A POSITION ADVERSE.

SO THAT OUGHT TO BE THE RULE. THAT HAS BEEN THE RULE IN ALL OTHER DISQUALIFICATION CONTEXTS, YOUR HONOR. THAT IS A BRIGHT LINE THAT COUNSEL WILL UNDERSTAND THAT IS ONE OF THE RISKS THAT GOES WITH REPRESENTING JOINT CLIENTS.

AND AS THE COURT IS PROBABLY AWARE, IT IS COMPLETELY CUSTOMARY AMONG LAW FIRMS OF ALL SIZES AND ALL REGIONS WHEN THEY UNDERTAKE JOINT REPRESENTATION TO DO AN INFORMED CONSENT TO THE CLIENT REGARDING PRECISELY THIS RISK.

NOW, WE DON'T HAVE THE FILES HERE. WE DON'T KNOW WHAT THE FEE AGREEMENTS SAY. WE DON'T KNOW WHAT KIND OF DISCLOSURES WERE MADE BY BOISE, SCHILLER AND FINNEGAN, HENDERSON WHEN THEY UNDERTOOK REPRESENTATION OF JOINT CLIENTS ABOUT WHAT THE RISK OF THAT REPRESENTATION WERE, BUT IT IS STANDARD PRACTICE AND IT IS A SALUTARY PRACTICE THAT IF A LAWYER IS GOING TO UNDERTAKE TO REPRESENT JOINT CLIENTS AT THE BEGINNING OF THE RELATIONSHIP THEY SIT DOWN WITH THOSE JOINT CLIENTS AND SAY, "HERE'S PART OF THE PROBLEM. I CAN PROTECT YOUR CONFIDENCES AS AGAINST THE WORLD, BUT I CAN'T MAINTAIN ANY CONFIDENCES BETWEEN YOU. I CAN REPRESENT YOUR INTERESTS AGAINST THE WORLD, BUT IF THE TWO OF YOU EVER DEVELOP A CONFLICT, I CAN'T REPRESENT EITHER OF YOU."

AND THERE'S A NARROW EXCEPTION ABOUT THAT THAT IS REPRESENTED BY ONE OF THE CALIFORNIA CASES AND I'M SORRY -- I'M DRAWING A BLANK ON IT RIGHT NOW, BUT WHEN A FEE AGREEMENT ANTICIPATES THAT A CONFLICT MAY ARISE AMONG JOINT COUNSEL, LAWYERS CAN PUT IN THEIR DISCLOSURE "IN THE EVENT THAT CONFLICT ARISES, I WILL CONTINUE TO REPRESENT PARTY X AND NOT PARTY Y."

THERE'S NO EVIDENCE THAT THAT TYPE OF DISCLOSURE WAS MADE HERE. THERE'S NO EVIDENCE THAT CONNECTU EVER CONSENTED TO THAT AT THE TIME IT UNDERTOOK THIS JOINT REPRESENTATION.

SO, YOUR HONOR, THAT'S -- I HATE TO BE SIMPLISTIC, BUT THAT'S MY ANSWER TO YOUR QUESTION.

AND I WOULD JUST STRESS THAT ANY OTHER RULING THAT YOU MAKE REALLY DOES VIOLENCE TO WHAT THE RULES ABOUT JOINT REPRESENTATION ALWAYS HAVE BEEN.

THE COURT: WELL, IT DOES SEEM TO ME THAT

ALTHOUGH SIMPLISTIC, IT DOES HAVE THE BRIGHT LINE TEST, BUT IT BOTHERS ME TO ADOPT IT AS A RULE WHEN UNDER CIRCUMSTANCES SUCH AS THIS, WHICH IS WHY I WANTED TO UNDERSTAND THE ADVERSITY.

CLEARLY THIS IS NOT A MOTION THAT COULD BE MADE BY THE FACEBOOK ASKING THAT THE FOUNDERS NOT BE REPRESENTED BY THE ATTORNEYS WHO HAD REPRESENTED THEM IN THE PRE-EXECUTION STAGE OF THE CASE.

CONNECTU IS MAKING THE MOTION, NOT THE FACEBOOK, BUT THIS IS A MOTION MADE BY THE NEW CONNECTU AND THE ADVERSITY IS CREATED BECAUSE THE NEW CONNECTU WOULD WISH TO MAINTAIN THE CURRENT STATUS QUO; THAT IS, TO BE OWNED BY THE FACEBOOK.

AND SO THIS IS NOT A SITUATION WHERE THERE WERE PRIOR JOINT CLIENTS AND THE ADVERSITY IS BECAUSE THE LAWYERS ARE NOW SUING ONE JOINT CLIENT AGAINST ANOTHER. CONNECTU AND THE FOUNDERS ARE BOTH APPELLANTS. THEY'RE NOT -- THERE'S NO FEE BETWEEN THEM AT THIS TIME. THERE'S NO LAWSUIT BEING BROUGHT BY NEW CONNECTU AND THERE'S NO LAWSUIT BROUGHT BY NEW CONNECTU AGAINST THE FOUNDERS. THEY ARE CO-PARTIES ON THE APPELLATE SIDE OF THE BRIEFING.

NOW, IT IS TRUE, THAT'S WHY I STARTED OUT

WITH WHAT IS THE ADVERSITY, A MOTION HAS BEEN MADE BY THE NEW CONNECTU TO ALLOW IT NO LONGER TO PARTICIPATE IN THE APPEAL, TO DISMISS THE APPEAL, TO BE NEUTRAL TO THE OUTCOME ESSENTIALLY.

IT WOULDN'T BE ADVOCATING AGAINST THE FOUNDERS, IT WOULDN'T BE ADVOCATING IN FAVOR OF THE FACEBOOK. IT WOULD SIMPLY STEP OUT OF THE APPEAL. THAT'S THE EFFECT OF THE DISMISSAL.

IT HASN'T MADE A MOTION TO JOIN THE OTHER SIDE.

AND SO BECOMING A NEUTRAL TO THE APPEAL, DOES THAT CREATE AN ADVERSITY BETWEEN THE FOUNDERS AND THE NEW CONNECTU?

IF THE FOUNDERS SAY, NO, FOR PURPOSES OF PRESERVING OUR RIGHT TO GET THE COMPANY BACK, WHICH IS WHERE WE BELIEVE WE ARE IN THIS WHOLE CASE, WE OPPOSE THAT MOTION TO ALLOW IT TO STEP OUT OF THE LITIGATION. I PRESUME THAT'S THE POSITION I'M GOING TO HEAR IN A MOMENT.

AND SO IF THIS WERE A CASE WHERE THE FOUNDERS HAD FILED A LAWSUIT AGAINST NEW CONNECTU, YOUR RULE WOULD BE ONE THAT I WOULD BE READILY EXAMINING AND MORE INCLINED TO ACCEPT, BUT WHERE THEY ARE CO-PARTIES I WORRY ABOUT THAT.

NOW, THE CLOSEST I GOT TO YOUR RULE WAS

THE LETTERS THAT WERE EXCHANGED BETWEEN THE PARTIES WHERE THERE WAS A THREAT MADE OF LITIGATION BY THE FOUNDERS AGAINST NEW CONNECTU HAVING TO DO WITH A DEBT THAT THE FOUNDERS CLAIM IS OWED BY NEW CONNECTU BACK TO THE FOUNDERS. IT WASN'T QUANTIFIED IN ANY WAY. DO YOU KNOW THE AMOUNT OF THE DEBT?

MR. TOWERY: I DO NOT, YOUR HONOR.

THE COURT: I WAS INTENDING, IF I DIDN'T ASK THAT QUESTION, BECAUSE DEPENDING UPON THE ENORMITY OF THE DEBT, IT COULD HAVE SERIOUS IMPLICATIONS FOR WHETHER OR NOT THE FOUNDERS HAVE A SERIOUS CONFLICT OF INTEREST WITH NEW CONNECTU, WHAT IS THE BASIS OF A CLAIM? WAS THIS ON THE BOOKS? WAS IS PART OF THE SETTLEMENT? WAS IT PART OF THE RELEASE? I DON'T KNOW. THAT'S ALL PART OF WHAT I WANTED TO GET TO, BUT I APPRECIATE YOUR ARGUMENT.

THE OTHER PART OF IT CITING BASS AND TEKNI-PLEX, IT SEEMS TO ME THAT BOTH OF THOSE ARE CASES WHICH DISQUALIFY BASED UPON A CURRENT RELATIONSHIP BETWEEN THE OLD LAWYERS AND THE NEW COMPANY AND THOSE SITUATIONS BECAUSE THERE HAD BEEN A BUSINESS RELATIONSHIP WHERE THE LAWYERS WERE REPRESENTING THE COMPANY ALONE AND IT HAD DUTIES OF

LOYALTY AND A RIGHT TO CONTINUE TO TURN OVER CONFIDENTIAL INFORMATION AND TREAT THE ATTORNEY-CLIENT PRIVILEGE AS ACTIVE EVEN AFTER THE MERGER, THAT THE COURTS FOUND THAT DISQUALIFICATION SHOULD BE ORDERED.

AND I DON'T HAVE THAT HERE AS I CAN SEE AT THIS POINT.

MR. TOWERY: LET ME MAKE A FEW RESPONSIVE COMMENTS IF I MAY.

FIRST OF ALL, REGARDING THE LOAN, THE LOAN FROM THE FOUNDERS TO CONNECTU ABOUT WHICH THERE IS A THREAT OF SEEKING COLLECTION, THAT IS BASED ON THE FOUNDERS RESPONSE TO THE COURT'S QUESTION. THAT IS NOT PART OF THIS LITIGATION.

THEY PROVIDE NO DETAILS ABOUT IT, AND I BELIEVE THAT THEY MADE THE STATEMENT IN THEIR RESPONSE THAT THE CURRENT FOUNDER'S COUNSEL WOULD NOT BE INVOLVED IN THAT.

BUT THAT'S TOTALLY BESIDES THE POINT.

THE QUESTION IS, IS THERE ADVERSITY BETWEEN THE NEW CONNECTU AND FOUNDERS BY AND THROUGH THEIR COUNSEL? AND THE ANSWER IS THAT LOAN PROVIDES AN ADDITIONAL INDICES OF ADVERSITY.

WHAT WE KNOW AS CONNECTU IN ITS POST-DECEMBER 15TH OWNERSHIP IS THAT THE BOIES, SCHILLER LAW FIRM HAS MADE A THREAT AGAINST CONNECTU. CONNECTU OWNS THE FOUNDERS MONEY. IF YOU DO THIS, THAT MAY BE DISPARAGING THE RIGHTS.

AND THAT'S A CONTINGENT LIABILITY. IT DOESN'T NEED TO BE PART OF THE LITIGATION. IT DOESN'T NEED TO BE PART OF THE NINTH CIRCUIT CASE TO REPRESENT ADVERSITY.

THERE COULDN'T BE ANY MORE CLEAR ILLUSTRATION OF WHAT POSITIONAL ADVERSITY IS THAN THAT TYPE OF THREAT.

SO I THINK IT'S A VERY PERTINENT QUESTION THAT THE COURT ASKED, AND I AGREE WITH THE COURT THAT THE ANSWERS THAT WERE PROVIDED BY FOUNDER'S COUNSEL TO THE COURT'S QUESTION ARE NOT FULLY ILLUMINATING AND CONNECTU WOULD LIKE TO KNOW THE FURTHER ANSWERS TO THAT, BUT I RESPECTFULLY SUBMIT IT REPRESENTS ADVERSITY.

LET ME ALSO SAY THAT WHEN YOU INDICATE, YOUR HONOR, THAT RIGHT NOW THERE IS NO CONNECTU VERSUS FOUNDERS, YES, THAT'S TRUE IN A LITERAL SENSE AT THE MOMENT, BUT CONNECTU IS, AS I SAID AT THE VERY OUTSET OF MY REMARKS, DESIRES THAT THIS COURT'S RULING REGARDING ENFORCING THE JUDGMENT BE UPHELD.

CONNECTU WANTS TO MAINTAIN ITS STATUS AS

A FULLY OWNED SUBSIDIARY OF FACEBOOK, AND IN OUR RESPONSE TO THE COURT'S QUESTIONS, THERE WERE AT LEAST TWO INSTANCES WHERE WE INDICATED THAT CONNECTU RESPECTFULLY RESERVES THE RIGHT TO TAKE POSITIONS WHEN WE GET TO THAT POINT IN THE APPEAL. WE'RE NOT THERE YET BECAUSE OF THE HOLD ON THE BRIEFING SCHEDULE DUE TO THE MOTIONS BEING FILED.

BUT WHEN WE GET TO THE POINT OF TAKING THE POSITION, IF CONNECTU REMAINS PART OF THE CASE, CONNECTU MAY WELL JOIN FACEBOOK. SO THAT THERE'S CLEARLY THE POTENTIAL OF ADVERSITY.

ONE FINAL POINT I WANT TO MAKE IN RESPONSE TO THE COURT'S COMMENTS: YOU INDICATED THAT, THAT THE COURT INDICATED THAT IT WOULD BE MORE RECEPTIVE TO THE TYPE OF BRIGHT LINE TEST THAT I PUT FORWARD WERE IT NOT FOR THIS COMPLICATION OF THE APPEAL CHANGING THE PLAYING FIELD AND RETURNING TO A STATUS QUO ANTE AS ONE POTENTIAL OUTCOME OF THE APPEAL.

I DON'T KNOW HOW THE COURT CAN DO THAT WITHOUT DEPRIVING CONNECTU OF ITS LAWFUL RIGHTS. I DON'T KNOW HOW YOU CAN PUT A HOLD ON THIS IN LIGHT OF THE FACT THAT THAT'S ONE POSSIBLE OUTCOME OF THE APPEAL BY SAYING TO CONNECTU NOW YOU DON'T GET TO ENFORCE THE OBLIGATIONS THAT COUNSEL WOULD

OTHERWISE HAVE TO YOU BECAUSE THE APPEAL MIGHT CHANGE THAT.

AND I'M NOT AN APPELLATE SPECIALIST, YOUR HONOR, BUT IT STRIKES ME THAT THERE ARE OTHER REMEDIES TO ADDRESS THE ISSUE THAT IS ON THE COURT'S MIND THERE.

IF SOMEBODY IS CONCERNED THAT AN APPELLATE OUTCOME COULD DO GREAT HARM AND YOU WANT TO PRESERVE THINGS PENDING THE APPELLATE OUTCOME, THAT'S WHAT WE HAVE BONDS ON APPEAL FOR THE MONETARY ASPECT OF JUDGMENTS.

AND FOR THE NONMONETARY ASPECTS OF JUDGMENTS, SUCH AS IS INVOLVED HERE WITH RESPECT TO THE TRANSFER OF OWNERSHIP OF CONNECTU, THEY SOUGHT A STAY. THEY ALLEGED THAT THEY WERE GOING TO SUFFER IRREPARABLE HARM IF CONNECTU WERE CHANGED. THEY SOUGHT A STAY FOUR TIMES, AND IT WAS DENIED EVERY SINGLE TIME. THAT'S WHERE THAT ISSUE OUGHT TO BE FOUGHT OUT.

HAVING FOUGHT AND LOST THAT ISSUE, IT SEEMS TO ME THAT THE FOUNDERS ARE LEFT WITH, THE FOUNDERS AND THEIR COUNSEL, ARE LEFT WITH THE REALITY THAT CONNECTU IS A VALID ENTITY, A WHOLLY OWNED SUBSIDIARY OF FACEBOOK AND GETS TO ENFORCE ITS RIGHTS AGAINST ITS FORMER COUNSEL.

I DON'T KNOW HOW THE COURT COULD SHAPE ANY OTHER RULE THAT WOULD PROTECT THE INTEGRITY OF CONNECTU AS AN ENTITY HAVING THOSE RIGHTS.

THE COURT: LET ME CALL ON COUNSEL FOR THE FOUNDERS. I PRESUME THAT THE FACEBOOK'S COUNSEL MIGHT WANT TO SPEAK TO THIS, BUT I'LL REGARD THAT AS SORT OF A THIRD PARTY.

DID YOU JOIN IN THE MOTION OR NOT?

MR. CHATTERJEE: YOUR HONOR, WE DID NOT FORMALLY JOIN IN THE MOTION BECAUSE OF THE WAY THAT THIS BRIEFING ALL KIND OF PLAYED OUT.

WE ALSO VIEW OURSELVES AS SOMEWHAT OF A THIRD PARTY HERE. I DO HAVE SOME OBSERVATIONS ABOUT ALL OF THIS. I DON'T WANT TO INTERRUPT MR. BARRETT.

THE COURT: ALL RIGHT. LET'S HEAR FROM OTHER COUNSEL.

MR. BARRETT: YOUR HONOR, THIS WENT ON A LITTLE LONGER THAN I ANTICIPATED POSSIBLE. WOULD IT BE OKAY TO TAKE A QUICK BREAK?

THE COURT: SURE. WE'LL COME BACK IN FIVE MINUTES.

(WHEREUPON, A RECESS WAS TAKEN.)

THE COURT: VERY WELL.

MR. BARRETT: THANK YOU, YOUR HONOR.

GOOD MORNING. DAVID BARRETT FOR THE FOUNDERS.

YOUR HONOR, FIRST OF ALL, I WANT TO START BY THANKING THE COURT FOR TAKING THE TIME TO CONSIDER THIS MATTER SO CAREFULLY.

AND I WANT TO ENSURE THE COURT THAT OUR FIRM AND THE OTHER TWO FIRMS THAT ARE REPRESENTING THE FOUNDERS HERE TAKE THEIR ETHICAL OBLIGATIONS WITH EXTRAORDINARY SERIOUSNESS.

AND AT THE SAME TIME, WE DON'T BELIEVE THAT ANYTHING VIOLATIVE OF THOSE ETHICAL OBLIGATIONS HAS OCCURRED HERE.

PERHAPS IT'S NOT SURPRISING IN SPITE OF YOUR HONOR'S HISTORY OF THIS CASE, WE TAKE A VERY, VERY DIFFERENT VIEW OF THE LAW THAT IS APPLICABLE HERE THAN MR. TOWERY AND MR. CHATTERJEE.

I DON'T BELIEVE THAT THE COURT'S DENIAL OF THIS MOTION WHILE IT IS ABSOLUTELY TRUE THAT THERE IS NO CASE PRECISELY ON POINT INVOLVING THE KIND OF APPELLATE LITIGATION SITUATION THAT WE HAVE HERE, I DON'T BELIEVE IF YOU LOOK AT THE CASES THAT THE PARTIES ARE CITING TO YOU, I DON'T BELIEVE THAT WHAT YOUR HONOR WOULD BE DOING IN DENYING THE MOTION WOULD BE THE LEAST BIT RADICAL. INDEED IT WOULD BE ENTIRELY CONSISTENT WITH AT LEAST HALF A DOZEN CASES WHICH THE OTHER SIDE CONVENIENTLY

OVERLOOKS THE MOST IMPORTANT FACT HERE WHICH IS THAT CONNECTU AND THE FOUNDERS WERE JOINTLY REPRESENTED UNTIL DECEMBER OF 2008.

UP UNTIL THAT POINT THEY HAD COMPLETELY ALIGNED INTERESTS, JUST AS FACEBOOK AND CONNECTU'S INTERESTS ARE ALIGNED TODAY BECAUSE OF THE TRANSFER, FACEBOOK IS THE CORPORATE VEHICLE, IF YOU WILL, BY WHICH FIRST THE FOUNDERS AND NOW FACEBOOK ARE IMPLEMENTING THEIR LITIGATION STRATEGY AGAINST EACH OTHER.

WHAT IS VERY CLEAR FROM THE CASES, YOUR HONOR, I'LL BE HAPPY TO EXPLAIN THIS, IS THAT WHERE THAT BASIC ADVERSITY BETWEEN THE REAL PARTIES IN INTEREST IF YOU WILL, THE FOUNDERS ON ONE HAND, FACEBOOK ON THE OTHER, WHERE THAT -- AND COUNSEL EVEN REFERRED TO IT IN HIS ARGUMENT AS THE CORE ADVERSITY -- WHERE THAT ADVERSITY CONTINUES UNABATED AND WHERE COUNSEL CONTINUES TO REPRESENT THE SAME CORE INTERESTS ON EACH SIDE, NOTWITHSTANDING THE CHANGE IN POSITION BY CONNECTU, THE LEGAL ENTITY, THERE'S NO CONFLICT.

THE COURT: THAT I WILL GRANT YOU, THAT IF WE WERE TO LOOK AT THIS CASE PURELY AS THE FOUNDERS AND FACEBOOK, I WOULDN'T BE AS CONCERNED, BUT THAT'S NOT OUR CASE.

MR. BARRETT: I UNDERSTAND, YOUR HONOR.

THE COURT: YOU ACKNOWLEDGE THAT THE FOUNDERS OPPOSE THE MOTION BY CONNECTU TO DISMISS ITS APPEAL?

MR. BARRETT: YOUR HONOR, I THINK THAT WE SUBMITTED OUR RESPONSE TO THAT MOTION TO THE COURT AS ONE OF THE EXHIBITS, AND I DON'T MEAN TO AVOID THE QUESTION.

THE -- I THINK WHAT WE SAY IS THAT UNDER ALL OF THE CIRCUMSTANCES WHICH WE HAVE HERE, AND IN ORDER TO PROTECT THE RIGHT TO APPEAL, WHICH YOUR HONOR RECOGNIZED VERY, VERY EXPLICITLY IN AUGUST IN RULING ON THE FOUNDER'S MOTION TO INTERVENE, IN ORDER TO PROTECT THAT RIGHT, IF IT IS NECESSARY FOR CONNECTU TO REMAIN A NOMINAL PARTY TO THE APPEAL, THEY SHOULD REMAIN, IF IT'S NOT NECESSARY, THE FOUNDERS ARE PERFECTLY PREPARED TO PROSECUTE THE APPEAL, ARE PROSECUTING IT.

OBVIOUSLY A JOINT BRIEF WAS FILED IN OCTOBER BEFORE THE COURT ORDERED THE TRANSFER OF THE CONNECTU STOCK. THAT IS THE BRIEF THAT IS ON FILE. I THINK IT'S UP TO THE COURT OF APPEALS WHETHER, YOU KNOW, TECHNICALLY IT CONSIDERS FACE -- CONNECTU STILL A SIGNATORY TO THAT BRIEF OR NOT.

AT THE TIME THE INTERESTS WERE COMPLETELY

ALIGNED, AND WE FILED THE JOINT BRIEF.

THE COURT: SO THE ANSWER IS YES, THE FOUNDERS DO OPPOSE CONNECTU'S MOTION TO DISMISS THE APPEAL AS TO IT?

MR. BARRETT: SUBJECT TO THE CONSIDERATIONS THAT ARE -- THAT I DESCRIBED AND ARE SET FORTH IN THAT OPPOSITION, YES.

THE COURT: AND IN OPPOSING CONNECTU'S MOTION THE QUESTION BECOMES ARE THE FOUNDERS IN POSSESSION OF INFORMATION WHICH IT GAINED, WHICH COUNSEL GAINED WHEN IT WAS JOINTLY REPRESENTING THE TWO PARTIES WHICH COULD BE HELPFUL TO COUNSEL IN OPPOSING THE MOTION TO DISMISS BY NEW CONNECTU?

CAN IT USE SOME INFORMATION THAT IT GAINED WHEN IT WAS JOINTLY REPRESENTING THE CLIENTS AGAINST THAT CLIENT NOW THAT THE EXECUTION OF THE JUDGMENT IS TAKING PLACE? IS THE ANSWER YES OR NO TO THAT?

MR. BARRETT: THE ANSWER TO THAT, YOUR HONOR, IS YES. AND THE REASON IS BECAUSE ALL OF THE -- THERE IS NO INFORMATION THAT WE KNOW OF THAT CAME ORIGINALLY FROM CONNECTU THAT IS NOT ALSO KNOWN TO THE FOUNDERS.

THAT -- BECAUSE OF THE COMMON INTERESTS BETWEEN THE FOUNDERS AND CONNECTU AT THE TIME ALL

OF THIS WAS GOING ON AND UP THROUGH DECEMBER 15TH, EVERYTHING THAT THE -- THE ONLY WAY THAT CONNECTU AS A CORPORATE ENTITY, YOUR HONOR, KNEW ANYTHING, BECAUSE IT WAS A CORPORATION, WAS THROUGH THE FOUNDERS, THE INDIVIDUALS WHO HAD THE PERSONAL KNOWLEDGE.

THOSE INDIVIDUALS CONTINUE TO HAVE THAT PERSONAL KNOWLEDGE. THEY CAN OBVIOUSLY USE IT IN ANY WAY THEY WANT TO. IT WAS SHARED FREELY, IF YOU WILL, BETWEEN THOSE PARTIES AT THAT TIME. THERE WAS AND IN THE WORDS OF THE CASES, THERE WAS NO EXPECTATION OF CONFIDENTIALITY THAT CONNECTU HAD DURING THAT JOINT REPRESENTATION THAT IS GOING TO BE VIOLATED IN ANY WAY.

SO I DON'T --

THE COURT: WELL, I SEPARATE THOSE TWO THINGS.

IN OTHER WORDS, WHAT I HEAR YOU SAY IS THAT DURING THE JOINT REPRESENTATION CONNECTU, A CORPORATION, AND ITS SHAREHOLDERS WHO WE'RE CALLING THE FOUNDERS, HAD A UNITY OF INTEREST.

MR. BARRETT: UH-HUH.

THE COURT: THE QUESTION BECOMES, IF A CONFLICT DEVELOPS BETWEEN THE SHAREHOLDERS OR THE OFFICERS OR DIRECTORS OF ANY PARTIES IN THE

CORPORATION SUCH THAT THE SHAREHOLDERS AND THE OFFICERS AND THE DIRECTORS WOULD WISH TO PROCEED AGAINST THE CORPORATION, MAY THE LAWYERS WHO JOINTLY REPRESENTED THEM BOTH REPRESENT THE SHAREHOLDERS IN AN ACTION AGAINST THE CORPORATION?

MR. BARRETT: AND, YOUR HONOR, THAT IS THE LEGAL QUESTION THAT I THINK ON WHICH MR. TOWERY AND I SO STRONGLY DISAGREE, AND WHERE I THINK HE IS REALLY COMPLETELY MISREADING THE CASES. WHEREAS IF YOUR HONOR WAS TO FIND THAT THERE IS NO SUCH CONFLICT OR TO USE HIS LANGUAGE, YOU KNOW, HE SAYS HE WANTS TO ENFORCE THE RIGHTS OF CONNECTU IN ITS ATTORNEY-CLIENT PRIVILEGE, WELL, THAT'S A NICE GENERAL VAGUE STATEMENT TO MAKE, BUT IT COMPLETELY BEGS THE QUESTION OF WHAT RIGHTS DOES CONNECTU ACTUALLY HAVE IN THIS PARTICULAR CONTEXT?

AND THAT'S WHERE I THINK, YOUR HONOR, THAT THE CASES DON'T SUPPORT THE DEFENDANTS OR DON'T SUPPORT CONNECTU AND FACEBOOK AT ALL AND THEY DO SUPPORT US.

LET'S START WITH THE CHRISTIANSEN CASE IN THE NINTH CIRCUIT WHICH WE CITE IN OUR BRIEF. THE FORMER AND THE CURRENT CLIENTS WERE ENGAGED IN A JOINT REPRESENTATION. EACH CLIENT IS, THEREFORE, AWARE THAT ITS CONFIDENCES ARE BEING SHARED.

IN CHRISTIANSEN THE LAWYER ORIGINALLY REPRESENTED THE MANAGEMENT GROUP THAT TOOK OVER A CORPORATION.

AFTER THE TAKEOVER THE LAWYER REPRESENTED THE CORPORATION. THEN THERE WAS A RECEIVERSHIP AND THE LAWYER WAS AGAIN REPRESENTING THE MANAGEMENT GROUP AGAINST THE CORPORATION.

THE NINTH CIRCUIT VACATED THE DISQUALIFICATION BECAUSE JUST AS HERE, THE CORPORATION, CONNECTU, KNEW THAT ANY INFORMATION THAT IT CONVEYED TO THE LAWYERS DURING THE PERIOD PRIOR TO THE RECEIVERSHIP WOULD BE SHARED WITH THE MANAGEMENT GROUP.

THE NINTH CIRCUIT HELD THAT THE SUBSTANTIAL RELATIONSHIP TEST IS INAPPLICABLE WHEN THE FORMER CLIENT HAS NO REASON TO BELIEVE THAT THE INFORMATION GIVEN TO COUNSEL WILL NOT BE DISCLOSED TO THE CORPORATE COUNSEL.

THE COURT: AND I'VE READ THAT LANGUAGE MANY TIMES.

MR. BARRETT: RIGHT.

THE COURT: THAT THE SUBSTANTIAL RELATIONSHIP TEST IS INAPPLICABLE, BUT WHAT IS THE TEST THAT IS APPLICABLE?

MR. BARRETT: THE TEST, YOUR HONOR, TO

GET RIGHT TO THAT QUESTION, AND IT ISN'T JUST THE BASS CASE THAT COUNSEL TRIED TO PICK AS AN OUTLIER.

THE CHRISTIANSEN CASE THE NINTH CIRCUIT EXPRESSLY ADOPTED THE ALLEGAERT CASE FROM THE SECOND CIRCUIT.

IN OUR BRIEF WE CITED A CASE CALLED OCCIDENTAL HOTELS FROM THE SOUTHERN DISTRICT OF NEW YORK JUST A FEW YEARS AGO WHERE THE COURT DENIED DISQUALIFICATION.

THERE'S, OF COURSE, THE TEKNI-PLEX CASE, AND THERE ARE A COUPLE OF OTHER CASES THAT WE CITE IN OUR BRIEF. ONE CALLED ORBIT ONE, ANOTHER ONE CALLED FROM THE SECOND CIRCUIT CALLED INTERNATIONAL ELECTRIC CORP.

AND THE KEY, YOUR HONOR, AGAIN, IS THAT YOU LOOK AT ARE THE LAWYERS STILL ON THE SAME SIDE REPRESENTING THE SAME INTERESTS WITH THE SAME ADVERSITY WHERE IT IS THE CLIENT -- THIS IS THE LANGUAGE THAT IS USED IN SOME OF THE CASES -- WHERE IT'S THE CLIENT THAT SWITCHES SIDES, NOT THE LAWYER? THE DISQUALIFICATION DOESN'T APPLY.

AND, YOUR HONOR, I'D LIKE -- BECAUSE I THINK IT'S A VERY GOOD EXAMPLE, THE CASE THAT THEY RELY MOST HEAVILY ON, THE BRENNAN'S CASE FROM THE FIFTH CIRCUIT IS VERY INSTRUCTIVE BECAUSE THERE I

THINK YOU'LL AGREE THAT THE FACTS ARE REALLY QUITE DIFFERENT.

AND IN SOME OF THESE CASES YOU'RE ABSOLUTELY RIGHT THAT AS IN THE NINTH CIRCUIT CASE, YOU CAN LOOK AT THE GENERAL LANGUAGE AND IT DOESN'T NECESSARILY ANSWER YOUR QUESTIONS. AND I THINK THE FACTUAL CONTEXT AND ALL OF THE CIRCUMSTANCES ARE CRUCIAL.

IN THE BRENNAN'S CASE, WHAT HAPPENED WAS THAT THE BRENNAN FAMILY WAS RUNNING THESE VERY SUCCESSFUL NEW ORLEANS STYLE RESTAURANTS ALL OVER THE COUNTRY. THE LAWYER WAS REPRESENTING THE FAMILY CORPORATIONS WHICH RAN THOSE RESTAURANTS AND ALL OF THE MEMBERS OF THE FAMILY.

THE LITIGATION THAT GAVE RISE TO THE DECISION OCCURRED BECAUSE THERE WAS A SPLIT BETWEEN THE FAMILY MEMBERS. SOME OF THEM WANTED TO OPERATE THE BUSINESS ONE WAY, SOME OF THEM WANTED TO OPERATE THE BUSINESS ANOTHER WAY.

AND ULTIMATELY WHAT HAPPENED WAS THAT THE LAWYER WENT WITH ONE FAMILY FACTION AND SO THERE YOU HAD A SITUATION WHICH IS MUCH CLOSER TO WHAT COUNSEL WAS DESCRIBING WHERE THE LAWYER REALLY WAS REPRESENTING A GROUP, THE GROUP SPLIT INTO TWO PARTS THAT WERE ADVERSE TO EACH OTHER AND IN A WAY

THAT NEVER EXISTED BEFORE. AND THEN THE LAWYER CHOSE TO GO WITH ONE OF THOSE GROUPS.

AND IN THE BRENNAN CASE, YOUR HONOR, IT WAS EVEN WORSE BECAUSE THE MAIN ISSUE THAT WAS IN THE CASE BEFORE THE FIFTH CIRCUIT HAD TO DO WITH THE VALIDITY OF SOME OF THE TRADEMARKS AND OTHER INTELLECTUAL PROPERTY.

AND THE LAWYER HAD BEEN PERSONALLY INVOLVED IN OBTAINING THOSE TRADEMARKS. SO HE WAS LIKELY TO BE A WITNESS OR A WAS VERY DEEPLY INVOLVED IN THE FACTS, THE UNDERLYING FACTS THAT WERE AT ISSUE.

SO YOU HAD A CASE CLEARLY WHERE THE LAWYER WAS CHOOSING SIDES BETWEEN CLIENTS WHO HAD PREVIOUSLY NEVER BEEN ADVERSE.

THAT IS NOT ON BALANCE THE SITUATION THAT WE HAVE HERE. HERE IT IS AGAIN THE CLIENT, IF YOU WILL, CONNECTU THAT IS MOVED OVER THE LINE FROM THE FOUNDER SIDE OF THE LINE TO THE FACEBOOK SIDE OF THE LINE.

THERE'S A REFERENCE IN CONNECTU'S BRIEF TO THE FACT THAT THE LAWYERS CHOSE THIS. WE DIDN'T CHOOSE THIS, YOUR HONOR. WE WERE TOLD BY THE NEW MANAGEMENT A COUPLE OF DAYS AFTER FACEBOOK TOOK OVER THE COMPANY AND INSTALLED ONE OF THEIR

ASSISTANT GENERAL COUNSELS AS THE SOLE STOCKHOLDER, DIRECTOR, ET CETERA, ET CETERA, EVERYTHING OF CONNECTU. WE WERE TOLD YOU'RE BEING REPLACED BY MR. TOWERY.

NOW, THAT'S FINE. THAT ABSOLUTELY GOES WITH THE TERRITORY OF YOUR HONOR'S ORDER TRANSFERRING THE STOCK. THEY'RE THE OWNER. THEY'RE ABSOLUTELY ENTITLED TO DO THAT.

BUT WHAT THE CASES MAKE CLEAR THEY'RE NOT ENTITLED TO DO IS TO USE THAT PARTICULARLY WHEN THE APPEAL IS PENDING AND EVERYTHING MIGHT BE TURNED AROUND AFTER THE APPEAL, TO USE THAT TO INTERFERE WITH THE FOUNDERS, A, THE FOUNDERS OWN ATTORNEY-CLIENT PRIVILEGE, AND JUST AS IMPORTANTLY, THE FOUNDERS'S RIGHT TO COUNSEL OF THEIR OWN CHOICE.

AND, YOUR HONOR, AT THE VERY OUTSET OF OUR BRIEF WE CITE --

THE COURT: LET ME JUMP TO A COUPLE OF ISSUES BECAUSE YOUR RECITATION OF THE FACTS, THAT IS NOT WHERE I THINK THIS CASE WILL BE DECIDED.

TELL ME ABOUT THE DEBT.

MR. BARRETT: UH-HUH.

THE COURT: THE DEBT THAT THE FOUNDERS THREATENED SHOULD NOT BE ALTERED IN ANY RESPECT BY

CONNECTU POST-EXECUTION OF THE JUDGMENT.

FIRST, WHAT IS THE AMOUNT OF THIS DEBT?

MR. BARRETT: YOUR HONOR, I APOLOGIZE. I DO NOT KNOW THE ANSWER TO THAT QUESTION. I DON'T -- WE WOULD CERTAINLY ENDEAVOR TO FIND THAT OUT. I DON'T BELIEVE THE COURT HAD ASKED THAT QUESTION RESPECTFULLY.

THE COURT: WHATEVER THE AMOUNT, IT IS A DEBT WHICH WAS TRANSFERRED ACCORDING TO THE FOUNDERS THEN FROM OLD CONNECTU TO NEW CONNECTU.

MR. BARRETT: IT -- IT'S A DEBT OF THE -- THAT IS ON THE BOOKS OF THE CORPORATION, YES, YOUR HONOR.

THE COURT: ALL RIGHT. AND AS A DEBT ON THE BOOKS OF THE CORPORATION, IT IS A DEBT WHICH WAS PART OF THE TRANSFER, PART OF THE SETTLEMENT.

IN OTHER WORDS, IN THE SETTLEMENT OF THIS CASE WHERE STOCK OF CONNECTU WAS TRANSFERRED TO THE FACEBOOK AND THE FACEBOOK SENT STOCK AND CASH OVER TO THE FOUNDERS, CONNECTU AND THE ACQUISITION BROUGHT WITH IT THIS DEBT.

NOW, YOU SAY IT'S ON THE BOOKS OF THE CORPORATION. SO PART OF WHAT IS GOING ON HERE IS NOT ONLY DID FACEBOOK ACQUIRE THE STOCK OF THE COMPANY, IT ACQUIRED ALL OF THE OBLIGATIONS, THE

LIABILITIES OF CONNECTU.

WITH RESPECT TO THAT LIABILITY, IT SEEMS TO ME THAT A RELATIONSHIP MUST EXIST BETWEEN THE LAWYERS WHO REPRESENTED CONNECTU IN THE SETTLEMENT AND THE TRANSFER OF THAT WITH RESPECT TO MAKING SURE THAT CONNECTU'S CONFIDENTIAL INFORMATION WITH RESPECT TO THAT DEBT, ITS RIGHT TO COLLECT THAT DEBT, ARE PROTECTED.

IN OTHER WORDS, CONNECTU COULD COUNT ON THOSE LAWYERS WHO REPRESENTED IT IN THE SETTLEMENT TO HELP IT OUT IN MAKING SURE THAT IT'S ABLE TO PROVE THAT IT'S A BONA FIDE DEBT, PROVE THAT IT'S COLLECTIBLE; CORRECT?

MR. BARRETT: I GUESS THE FOUNDERS WOULD HAVE THAT INTEREST, BUT YES.

YOUR HONOR, LET ME JUST RESPOND AND THEN THERE ARE SEVERAL POINTS THAT I WOULD LIKE TO MAKE ABOUT THAT.

FIRST OF ALL, WHAT MR. TOWERY SAID ABOUT THE DEBT WAS VERY CAREFULLY PHRASED. WHAT HE SAID WAS WHAT WE KNOW AS CONNECTU IN ITS POST-DECEMBER 15TH FORM IS WE DON'T KNOW ANYTHING ABOUT THE DEBT.

WHAT REALLY HAPPENED, YOUR HONOR, WAS AFTER THE TERM SHEET WAS SIGNED, AND YOU'RE ABSOLUTELY RIGHT, AND YOU MAY RECALL FROM OUR

EARLIER PROCEEDINGS, THERE WERE EXTENSIVE NEGOTIATIONS BETWEEN FACEBOOK AND THE FOUNDERS CONCERNING THE DOCUMENTING OF THE TRANSACTION THAT WAS CONTEMPLATED BY THE TERM SHEET. AS YOU KNOW WE DON'T CONSIDER IT AN ENFORCEABLE CONTRACT, BUT THERE WAS A LOT OF BACK AND FORTH, DRAFT AGREEMENTS WERE EXCHANGED.

IN FACT, WHEN FACEBOOK FIRST CAME IN FRONT OF YOUR HONOR, THEY WERE MOVING TO ENFORCE SOME OF THOSE AGREEMENTS WHICH WERE A COUPLE HUNDRED PAGES LONG, AND YOU MAY RECALL AT THE FIRST HEARING MR. CHATTERJEE ACTUALLY SAID THAT EVEN THOUGH THEIR MOTION PAPERS ASKED TO ENFORCE THOSE EXTENSIVELY DRAFTED AND NEGOTIATED CORPORATE DOCUMENTS, HE SAID, OH, NEVER MIND, WE DON'T WANT THAT. YOU CAN JUST STAPLE THE TERM SHEET TO AN ORDER AND ORDER IT ENFORCED.

AND ULTIMATELY IN EFFECT YOUR HONOR'S ORDER USED THE TERM SHEET RATHER THAN THESE 200 PAGES OF CORPORATE DOCUMENTS.

THE LITIGATION FIRMS WERE NOT DIRECTLY INVOLVED IN NEGOTIATING THAT CORPORATE TRANSACTION.

MY UNDERSTANDING IS THAT THE DEBTS WERE VERY MUCH A SUBJECT OF DISCUSSION AND WERE DEALT WITH ONE WAY OR ANOTHER AND I DIDN'T GO BACK AND I

DON'T RECALL THE DETAILS OF HOW THEY WERE DEALT WITH IN THOSE PROPOSED CORPORATE DOCUMENTS THAT WERE ULTIMATELY, YOU KNOW, THERE WAS A DISAGREEMENT. THEY WERE NEVER EXECUTED. WE CAME TO COURT.

BUT FACEBOOK, IT'S MY UNDERSTANDING, WAS CERTAINLY AWARE OF THIS. SO FOR CONNECTU NOW TO SAY, OH, GEE, WHAT DEBTS? WE DON'T KNOW ANYTHING ABOUT THIS. MAYBE THAT'S LITERALLY TRUE IF YOU DIVORCED FACEBOOK AFTER DECEMBER 15TH FROM THE KNOWLEDGE OF ITS CORPORATE PARENT, IF YOU -- EXCUSE ME -- IF YOU DIVORCE CONNECTU AFTER DECEMBER 15TH, FROM THE KNOWLEDGE OF ITS CORPORATE PARENT FACEBOOK, BUT THESE DEBTS HAVE BEEN KNOWN TO THE FACEBOOK SIDE, YOUR HONOR.

THE SECOND POINT THAT I WANT TO MAKE --

THE COURT: WELL, BUT I'M NOT SURE THAT YOU'RE TRACKING MY CONCERN.

MY CONCERN THAT COMES OUT OF TEKNI-PLEX AND THESE OTHER CASES --

MR. BARRETT: UH-HUH.

THE COURT: -- IS THE QUESTION THAT I PUT TO MR. TOWERY, IS THERE A CONTINUING OBLIGATION BY THE FINNEGAN/BOIES LAWYERS TO THE NEW ENTITY BECAUSE THAT BECAME IMPORTANT TO THE COURT IN THE

CASES THAT I HAVE READ?

I'M SATISFIED THAT I HAVE A GOOD HANDLE ON THE RELATIONSHIPS WITH RESPECT TO THE TRANSACTION ITSELF.

MR. BARRETT: UH-HUH.

THE COURT: IT IS THE POST-TRANSACTION RELATIONSHIPS THAT I'M TRYING TO SORT OUT.

THE FIRST QUESTION THAT I HAVE AND IT'S THE ONE THAT I PUT OUT IS WHETHER THERE'S AN ADVERSITY AND WHAT IS THE NATURE OF THAT ADVERSITY?

AND PART OF THAT TRYING TO DETERMINE THE ADVERSITY IS WHETHER OR NOT THE FOUNDERS HAVE A CLAIM AGAINST CONNECTU WITH RESPECT TO THIS OBLIGATION AND WHETHER THEY HAVE INFORMATION WITH RESPECT TO THE CREATION OF THIS DEBT, THE TRANSFER OF THE DEBT, THE AMOUNT OF THE DEBT WHICH THEY WOULD NOW BE USING AGAINST CONNECTU.

IN OTHER WORDS, THIS IS -- THIS WOULD BE A TYPICAL SITUATION WHERE SHAREHOLDERS AND IN A CLOSE CORPORATION COULD BE REPRESENTED BY JOINT LAWYERS.

BUT THE MOMENT THE SHAREHOLDERS SUE THE CORPORATION TO COLLECT THE DEBT OWED TO THE CORPORATION, I SEE A DIFFERENT LEGAL RELATIONSHIP WHERE THE LAWYERS CAN'T CONTINUE TO REPRESENT BOTH.

THEY CAN'T SAY, WELL, WE'LL REPRESENT THE SHAREHOLDERS AND WE'LL REPRESENT THE COMPANY.

MR. BARRETT: YOUR HONOR, WE'RE NOT REPRESENTING THE COMPANY AND WE HAD NO INTENTION OF REPRESENTING THE COMPANY WITH RESPECT TO THE DEBT.

THE COURT: HOWEVER, IS THERE AN OBLIGATION WITH RESPECT TO THE COMPANY WITH RESPECT TO THAT DEBT?

IN OTHER WORDS, DO THE LAWYERS WHO REPRESENTED THE TRANSFER OF THE DEBT OR THE CREATION OF THE DEBT OR ANYTHING IN RELATIONSHIP TO THAT?

IF YOU TELL ME NO, THAT DEBT IS EXTRANEOUS TO THIS WHOLE LITIGATION AND THE ONLY REASON IT CAME UP WAS BECAUSE IT WAS INTERJECTED IN THE LITIGATION BY THE LAWYERS AS A DEMAND THAT IT NOT BE AFFECTED IN ANY WAY BY NEW CONNECTU, YOU HAVE GOT TO PRESERVE THE FOUNDER'S INTEREST IN THAT DEBT, DON'T DO ANYTHING TO AFFECT THE FOUNDER'S INTEREST IN THE DEBT.

AND SO IT TOOK THE POSITION ADVERSE, IT SEEMS TO ME, TO CONNECTU WITH RESPECT TO THAT DEBT AND USE THAT ADVERSITY AS A CHIP IN THE LITIGATION. DON'T DO ANYTHING WITH RESPECT TO THAT DEBT BECAUSE IT'S TIED TO THIS APPEAL AND ALSO TOOK THE POSITION

WITH RESPECT TO THE DISMISSAL OF THE APPEAL AND THREATENED TO LITIGATION WITH RESPECT TO THE DISMISSAL AGAINST NEW CONNECTU WITH RESPECT TO THAT DISMISSAL.

THAT'S WHAT I'M TRYING TO UNDERSTAND.

MR. BARRETT: RIGHT.

THE COURT: WHAT IS THE CONTINUING RELATIONSHIP BETWEEN WHAT THE LAWYERS LEARNED WHEN THEY WERE JOINTLY REPRESENTING THE TWO CLIENTS AND THAT MIGHT BE USED AGAINST NEW CONNECTU?

MR. BARRETT: WELL, AGAIN, YOUR HONOR, IN THE FIRST PLACE, THESE LAW FIRMS HAD NOTHING TO DO WITH THE CREATION OF THE DEBT.

AS I SAID, THE DEBT CAME UP AS ONE THE THINGS THAT THE PARTIES DISCUSSED IN TRYING TO STRUCTURE THE CORPORATE TRANSACTION SO THAT FACEBOOK WAS AWARE OF IT.

THE COMMUNICATION THAT COUNSEL REFERS TO, AND I'M NOT SURE WHETHER IT'S MATERIAL OR NOT, BUT THE COMMUNICATION SAYS THAT YOU SHOULD BE AWARE THAT THERE IS DEBT, AND IF YOU WERE TO DISMISS THE APPEAL, YOU MAY BE COMMITTING A FRAUDULENT TRANSFER.

THAT'S ALL THAT WAS SAID. THERE WAS NOTHING ABOUT COLLECTING THE DEBT.

WE'RE NOT GOING TO BE INVOLVED IN COLLECTING THE DEBT. WE HAVE -- THE THREE FIRMS HAVE NO INTENTION OF BEING INVOLVED IN THAT.

SO TO ADDRESS YOUR HONOR'S QUESTION, IF THERE IS EVER A LITIGATION -- AND BY THE WAY, YOUR HONOR, THIS DEBT, AS YOU JUST SAID, IS COMPLETELY EXTRANEOUS TO THE LITIGATION. IT'S LIKE ANY OTHER PART OF CONNECTU'S BUSINESS, OF WHICH THERE ISN'T VERY MUCH, BUT IT'S A TRANSACTION THAT ARISES IN CONNECTION WITH CONNECTU'S BUSINESS.

AND, YOU KNOW, WE'RE NOT GOING TO BE INVOLVED IN IT. IT IS EXTRANEOUS TO THE APPEAL OTHER THAN WE THOUGHT IT WAS RELEVANT TO POINT OUT TO THEM THAT IF THE APPEAL IS DISMISSED, THERE'S A POSSIBILITY THAT THAT'S A FRAUDULENT CONVEYANCE, BUT, YOU KNOW, THAT'S -- YOU KNOW, IT IS WHAT IT IS. THAT STATEMENT IS WHAT IT IS.

I BELIEVE THAT THE RIGHT OF THE FOUNDERS TO MAKE THOSE KINDS OF ASSERTIONS OR FOR THAT MATTER TO OPPOSE CONNECTU'S EFFORT TO DISMISS THE APPEAL IS PART AND PARCEL OF WHAT THE CASES THAT I WAS DISCUSSING EARLIER WHICH REFUSED TO DISQUALIFY LAWYERS IN THE SORT OF POST-MERGER SITUATION.

THE COURT: NOW, HERE'S THE CONNECTION.

MR. BARRETT: YES.

THE COURT: ONE CONNECTION I SEE IS THAT THE FOUNDERS WOULD HAVE THE -- ON APPEAL HAVE THE CASE GO BACK TO THE STATUS QUO ANTE, WHICH MEANS THAT THEIR CLAIMS AGAINST THE FACEBOOK WOULD BE REVIVED.

MR. BARRETT: UH-HUH.

THE COURT: THEY'RE OWED DEBTS BY NEW CONNECTU. THE ONLY WAY THAT THEY'RE GOING TO BE PAID THOSE DEBTS IS TO GET THAT LITIGATION BACK ON TRACK AND WIN.

SO THEY'RE MOTIVATED TO GET THE COMPANY BACK FOR THEIR OWN PERSONAL BENEFIT, NAMELY, TO GET THE COMPANY BACK SO THAT THEY CAN WIN THE EVENTUAL LITIGATION AND BE PAID THEIR PERSONAL DEBTS.

CONNECTU, ON THE OTHER HAND, MIGHT BE ABLE TO EXTINGUISH THAT ENTIRE DEBT TO THE FOUNDERS, LEAVE ITSELF FREE FROM THAT ENTIRE DEBT IF IT IS ABLE TO ESSENTIALLY DISMISS THE APPEAL, END THE LITIGATION. THE SETTLEMENT WOULD BE THE ONLY THING THAT WOULD BE OBTAINED AND THERE'S NOT A CURRENT CLAIM FOR THAT DEBT.

MR. BARRETT: RIGHT. YOUR HONOR IS ABSOLUTELY RIGHT, BUT WHAT YOU HAVE JUST DONE, RESPECTFULLY, YOUR HONOR, IS THAT YOU HAVE DEFINED THE BASIC ADVERSITY OF THE TWO SIDES.

WHETHER THE FOUNDERS ARE OWED MONEY BY CONNECTU OR NOT, THEY STILL WANT TO PURSUE THE APPEAL. THEY DON'T WANT CONNECTU TO DROP THE APPEAL BECAUSE THEY THINK THEY SHOULD BE GETTING MORE CONSIDERATION THAN THEY DID IN THE FRAUDULENT TRANSACTION, YOU KNOW, THE WHOLE STORY.

THE POINT IS THAT THAT'S EXACTLY THE SAME UNDERLYING ADVERSITY THAT HAS EXISTED ALL ALONG IN THIS CASE. AND AGAIN, IT IS, YOU KNOW, I'M LIKE A BROKEN RECORD, IT IS CONNECTU, THE CORPORATE VESSEL WHICH HAS SWITCHED SIDES, NOT THE LAWYERS, NOT THE PARTIES.

THE DISPUTE, AND IT'S THE SAME DISPUTE AND WHETHER YOU, YOU KNOW, WHETHER YOU PAPER IT UP WITH A PROMISSORY NOTE OR, YOU KNOW, WITH WHATEVER THE CIRCUMSTANCES ARE, THAT'S WHAT THE PARTIES ARE FIGHTING OVER: IS THIS SETTLEMENT ENFORCEABLE? IS CONNECTU OR ARE THE FOUNDERS, RATHER, ARE THE FOUNDERS ENTITLED TO GO BACK TO THE STATUS QUO AND RENEGOTIATE THAT SETTLEMENT OR PURSUE LITIGATION OR RENEGOTIATE THE SETTLEMENT WITH NEW AND CORRECT INFORMATION FROM FACEBOOK?

THAT IS THE UNDERLYING DISPUTE. THAT IS WHAT THE CASES SAY WHERE THERE'S BEEN JOINT REPRESENTATION, THE LAWYER IS ALLOWED TO STICK WITH

THE SIDE THAT EVERYBODY UNDERSTOOD THE LAWYER WAS ALWAYS REPRESENTING ALL ALONG.

THE COURT: NOW, I TAKE IT, IT GOES WITHOUT SAYING THAT YOU DON'T TAKE ANY POSITION THAT THE NEW CONNECTU IS NOT A FORMER CLIENT?

I MEAN, BEFORE IT WAS A CLOSELY HELD CORPORATION OWNED BY THE FOUNDERS AND NOW IT'S A SUBSIDIARY CORPORATION OF THE FACEBOOK.

YOUR POSITION, THOUGH, IS THAT THAT IS YOUR FORMER CLIENT?

MR. BARRETT: YES, THAT'S CORRECT, YOUR HONOR.

THE COURT: AND TO THAT EXTENT THERE ARE NO DUTIES OF LOYALTY OR FIDUCIARY DUTIES OWED TO YOUR FORMER CLIENT?

MR. BARRETT: WELL, THERE MAY VERY WELL BE, YOUR HONOR. AS TO EVERYONE ELSE IN THE WORLD, WE CERTAINLY HAVE DUTIES TO PROTECT THOSE CONFIDENCES AND SO FORTH AS TO THIRD PARTIES.

THE ISSUE WE'RE DISCUSSING HERE IS AS BETWEEN CONNECTU AND THE FOUNDERS WITH RESPECT TO ANYTHING THAT OCCURRED PRIOR TO DECEMBER 15TH.

AS TO THAT I WOULD SAY THAT IS CORRECT AND I WOULD CITE, YOUR HONOR, BY THE WAY, TO THE OCCIDENTAL HOTELS CASE IN THE SOUTHERN DISTRICT OF

NEW YORK WHICH I MENTIONED EARLIER.

THE COURT: NOW OCCIDENTAL, IS THAT THE CASE THAT ALSO INVOLVED JONES DAY?

MR. BARRETT: TO BE HONEST WITH YOU --

THE COURT: I BELIEVE IT WAS.

MR. BARRETT: -- I'M NOT SURE.

THE COURT: YEAH. IT WAS THE LAWYER RICHEY WHO EVENTUALLY JOINED JONES DAY. YES.

SO JONES DAY COMES UP SEVERAL TIMES.

MR. BARRETT: I GUESS THEY DO A LOT OF CORPORATE WORK, YOUR HONOR.

AND THAT CASE, BY THE WAY, YOUR HONOR, SPECIFICALLY DISCUSSES NOT ONLY THE CONFIDENTIALITY BUT ALSO THE DUTY OF LOYALTY WHICH COUNSEL REFERRED TO AND MAKES CLEAR THAT IT DOESN'T SERVE THE PURPOSE OF PROTECTING A FORMER CLIENT'S EXPECTATION IN EITHER REGARD, LOYALTY OR CONFIDENTIALITY, WHEN IT'S THE CLIENTS RATHER THAN THE LAWYER THAT HAVE CHANGED POSITION FROM ALIGNMENT IN THAT CASE WITH THE SELLER AND FORMER OWNER TO ALIGNMENT WITH THE BUYER.

THE COURT: NOW, I HAVEN'T RAISED THIS BEFORE, BUT LET ME RAISE IT WITH YOU AND PERHAPS THE OTHER PARTIES WILL WANT TO ADDRESS IT.

WHAT I READ IN THESE CASES IS A BIG

CONCERN ABOUT THE PUBLIC.

MR. BARRETT: UH-HUH.

THE COURT: IT'S THE ROLE OF THE LAWYERS TO BE IN A CONFIDENTIAL RELATIONSHIP AND TO TREAT THAT WITH A CERTAIN DEGREE OF CARE.

NOT ONLY IS THERE A CONCERN BY THE COURTS TO ETHICAL RULES INSOFAR AS THE FAIRNESS OF LITIGATION. WE HAVE BEEN TALKING A LOT ABOUT FAIRNESS OF LITIGATION HERE, BUT THE COURT IS CONCERNED WITH THE EXPECTATIONS OF THE CLIENTS.

AND WHAT THAT CAUSES ME THEN TO BE CONCERNED ABOUT IS HOW SHOULD LAWYERS CONDUCT THEMSELVES SO THAT THE PUBLIC WILL HAVE CONFIDENCE THAT IN THIS KIND OF A SITUATION THEIR INTERESTS WILL BE PROTECTED?

BECAUSE WE'RE GOING TO BE LOOKING BACK TO MAKING A RULE, WHICH WILL ALLOW LAWYERS TO TAKE ON JOINT REPRESENTATION.

MR. BARRETT: UH-HUH.

THE COURT: BUT AT SOME POINT, PERHAPS, TO UNDERSTAND THAT IN DOING SO THEY MIGHT BE IN A SITUATION WHERE THEY HAVE TO DISQUALIFY THEMSELVES.

NOW, YOUR RULE WOULD BE THAT YOU WOULDN'T HAVE TO DISQUALIFY YOURSELVES UNDER THESE CIRCUMSTANCES WHERE YOU TAKE ON JOINT

REPRESENTATION AND AFTER THE MERGER THERE IS AN EFFORT TO REST CONTROL BACK AND TO TAKE ON YOUR FORMER CLIENT FOR THAT PURPOSE.

AND SO THE QUESTION THAT I'M PUTTING TO YOU IS, IS THAT A RULE THAT CUTS BEFORE OR AGAINST PUBLIC CONFIDENCE IN THE ROLE OF LAWYERS WHEN THEY TAKE ON CO-CLIENTS?

MR. BARRETT: WELL, AGAIN, YOUR HONOR, AND I'LL SAY THIS AGAIN, WE HAVE CITED AT LEAST HALF A DOZEN CASES WHICH I BELIEVE EXACTLY SUPPORTS THAT RULE.

SO THAT IS NOT A RADICAL STEP. INDEED I WOULD SAY THAT THE RADICAL STEP WOULD BE TO DISQUALIFY THE LAWYERS IN THIS CASE.

SECONDLY, WITH RESPECT TO PUBLIC CONFIDENCE, YOUR HONOR, THERE ARE, YOU KNOW, THERE ARE TWO SIDES TO THAT COIN. THERE ARE VERY MUCH TWO SIDES TO THAT COIN.

AND I ALLUDED TO THE FOUNDER'S SIDE EARLIER. THEY ALSO HAVE THE RIGHT TO COUNSEL OF THEIR CHOICE AND TO PROTECT THE CONFIDENCES THAT THEY SHARED WITH COUNSEL IN THE CONTEXT WHERE THIS CLOSELY HELD CORPORATE VEHICLE CONNECTU WAS, YOU KNOW, WAS REALLY THEIRS AND ANYTHING IT DID WAS WHAT THEY WANTED IT TO DO.

AND THIS GOES, THIS -- ONE REASON I MENTION THIS, YOUR HONOR, IS THAT THIS GOES TO THE QUESTION OF THE DOCUMENTS WHICH YOU RAISED EARLIER.

BUT IN TERMS OF PUBLIC CONFIDENCE, ABSOLUTELY, YOUR HONOR, YOU ARE BALANCING. THERE IS NO DOUBT ABOUT IT HERE. YOU ARE BALANCING TWO THINGS. YOU'RE BALANCING THE RULES THAT MR. TOWERY TALKED ABOUT AGAINST THE INTERESTS, AND I SUBMIT TO YOU IT'S A VERY STRONG INTEREST THAT CLIENTS HAVE IN ENGAGING IN JOINT REPRESENTATION IN SITUATIONS LIKE THIS.

THEY WANT TO HAVE ONE LAWYER REPRESENTING THEM. THERE ARE HUGE ECONOMIES AS FAR AS THE CLIENTS ARE CONCERNED. OBVIOUSLY NOBODY BELIEVES THERE'S GOING TO BE A PROBLEM LATER ON AND IT'S UP TO THE LAWYERS TO ANTICIPATE WHERE THERE MIGHT BE PROBLEMS.

COUNSEL'S SUGGESTION, THAT, "OH, YOUR HONOR, YOU CAN HANDLE IT BY HAVING A SEPARATE LAW FIRM OR YOU CAN HANDLE IT IN A RETAINER AGREEMENT," YOUR HONOR, IN THE REAL WORLD THAT'S JUST NOT WORKABLE.

JUST LIKE MR. CHATTERJEE AND MR. TOWERY ARE I'M SURE WORKING HAND IN GLOVE TO PROTECT THE COMMON INTERESTS OF THEIR CLIENTS IN THIS CASE.

IF THE FOUNDERS HAD A SEPARATE LAW FIRM ALL ALONG, THAT LAW FIRM WOULD HAVE BEEN SHARING ALL OF THE SAME CONFIDENTIAL INFORMATION WITH US AND MR. TOWERY WOULD BE IN HERE SAYING, WELL, YOU'VE GOT TO DISQUALIFY BOIES, SCHILLER BECAUSE THEY'RE TAINTED BY ALL OF THE INFORMATION THAT THEY GOT FROM CONNECTU'S FORMER COUNSEL WHO HAS NOW BEEN FIRED.

IT, IT -- YOU HAVE TO, IN CONSIDERING THE ISSUE OF PUBLIC PERCEPTION, YOUR HONOR, I THINK WE HAVE TO LOOK AT THE REALITY OF THE SITUATION.

THE REALITY IS THAT THESE KINDS OF JOINT REPRESENTATIONS OCCUR ALL OF THE TIME. THE COURTS HAVE ACTUALLY COME UP WITH WHAT I CONSIDER TO BE, YOU KNOW, UNDER THE CIRCUMSTANCES THAT THERE ARE A MILLION DIFFERENT VARIATIONS POSSIBLE, WHAT IS ACTUALLY A PRETTY GOOD BRIGHT LINE RULE, WHICH IS IF IT'S THE CLIENT THAT CHANGES SIDES, WHETHER IT'S THROUGH A MERGER OR THROUGH ENFORCED JUDGMENT IN THE LITIGATION OR SOME OTHER CIRCUMSTANCE THAT NEITHER OF US CAN ANTICIPATE, IF IT'S THE CLIENT THAT CHANGES SIDES, IF THE LAWYERS CONTINUE TO REPRESENT THE SAME INTERESTS THAT THEY HAVE ALL ALONG, IF THE FUNDAMENTAL ADVERSITY IN THE CASE DOESN'T CHANGE, UNLIKE THE BRENNAN SITUATION WHERE

IT DID CHANGE, IF IT DOESN'T CHANGE, THE LAWYERS CAN CONTINUE TO WORK AND THERE IS NO --

THE COURT: HOW DO YOU DISTINGUISH TEKNI-PLEX?

MR. BARRETT: WELL, IN TEKNI-PLEX, YOUR HONOR, THAT TO ME IT DOESN'T REACH THIS ISSUE.

WHAT WAS GOING ON IN TEKNI-PLEX WAS THAT, YOU KNOW, THE TRUSTEE -- THE ISSUE WAS -- AM I GETTING IT RIGHT? -- THAT THE TRUSTEE --

THE COURT: THIS WAS THE SITUATION WHERE THERE WAS AN ARBITRATION PROCEEDING AGAINST THE SOLE SHAREHOLDER TANG WHO HAD COME INTO THE CASE AND THEN THEY DEFERRED THE QUESTION OF DISQUALIFICATION AGAINST THE MEYNER AND LANDIS FIRM TO THE COURT.

MR. BARRETT: RIGHT.

THE COURT: AND THE COURT THERE DISQUALIFIED THE LAWYERS.

MR. BARRETT: WELL, YEAH, AND I THINK THAT THE SITUATION, YOU KNOW, AGAIN, YOU'VE GOT TO LOOK AT ALL OF THE FACTS, BUT THE LITIGATION THERE HAD TO DO WITH THE ENVIRONMENTAL LIABILITIES THAT TANG HAD INCURRED FOR THE CORPORATION.

THE FIGHT, THE VERY FIGHT THAT WAS GOING ON WAS A FIGHT WHERE THE LAWYER WAS NECESSARILY

TAKING SIDES BETWEEN THE TWO PARTIES. I WOULD SAY THAT THAT SITUATION IS REALLY CLOSER TO THE BRENNAN SITUATION THAN IT IS TO THE SITUATION IN THE OTHER CASES WHERE IT AGAIN IS CLEARLY THE CLIENT THAT SWITCHES SIDES.

THERE THE LAWYER WAS TAKING THE -- WAS TAKING THE SIDE OF ONE OF THE JOINT CLIENTS IN A SITUATION WHERE A NEW CONFLICT HAD DEVELOPED BETWEEN THE TWO CLIENTS.

THE COURT: I'VE GOT ABOUT TEN MORE MINUTES.

MR. BARRETT: SURE.

THE COURT: SPEAK TO THE DOCUMENTS QUICKLY.

ANY REASON WHY IF I DO ACCEPT MR. TOWERY'S ARGUMENT THAT A HALF LOAF WOULD SATISFY HIM, WHY YOU SHOULD NOT TURN OVER ALL OF THE DOCUMENTS OF CONNECTU WHICH WOULD ALLOW THE NEW OWNER TO OPERATE THE BUSINESS SUCCESSFULLY?

MR. BARRETT: YES. YOUR HONOR, UM, I DON'T BELIEVE THAT WE HAVE EVER SAID THAT WE WOULDN'T DO THAT.

THE REQUESTS THAT HAVE BEEN MADE WERE REQUESTS TO THE LITIGATION LAWYERS TO TURN OVER LITIGATION FILES AND BUSINESS FILES.

TO THE EXTENT THAT THE LITIGATION LAWYERS EVER HAD BUSINESS FILES, THOSE WERE HANDLED IN THE COURSE OF DISCOVERY AND THEY WERE, AS FAR AS WE KNOW, THEY WERE TURNED OVER TO THE FACEBOOK SIDE.

THEY ARE NOW -- THEY NOW SEEM TO BE FOCUSSING ON SOME DIFFERENT DOCUMENTS THAT WERE NOT NECESSARILY PART OF THE LITIGATION THAT WE WERE NEVER FORMALLY ASKED FOR.

AS FAR AS I KNOW THEY NEVER CONVEYED ANY REQUEST TO THE FOUNDERS TO TURN OVER THOSE DOCUMENTS, EVEN THOUGH THAT MIGHT WELL HAVE BEEN CONTEMPLATED BY YOUR ORDER.

THE COURT: HERE'S WHY I'M CONCERNED ABOUT THAT PART OF IT: THERE'S A MEETING BETWEEN THE FOUNDERS AND THEIR LAWYERS AND AMONG THE THINGS THAT COULD HAVE BEEN SAID IN THAT MEETING IS, YOU KNOW, THIS IS A GREAT DEAL FOR THE COMPANY BECAUSE IT GETS OUT OF A QUESTIONABLE LITIGATION. IT'S SUING THE FACEBOOK ON THESE CLAIMS THAT MAY HAVE NO MERIT WHATSOEVER.

MR. BARRETT: SURE.

THE COURT: AND WE GET STOCK AND CASH. AND SO NOW NEW CONNECTU WISHES TO GET OUT OF THAT APPEAL AND PERHAPS USE THAT INFORMATION TO SUPPORT ITS POSITION THAT THE APPEAL HAS NO MERIT.

MR. BARRETT: UH-HUH.

THE COURT: THE LAWYERS NOW WILL BE ABLE TO USE THAT INFORMATION IN A WAY TO KEEP IT FROM NEW CONNECTU, USE IT TO SUPPORT THE FOUNDERS.

AREN'T THEY BY DEFINITION TAKING A POSITION IN FAVOR OF ONE CLIENT THAT HURTS ANOTHER CLIENT?

BECAUSE IF IN THAT CONVERSATION THE LAWYERS HEARD FROM THE FOUNDERS SOMETHING THAT WOULD ASSIST CONNECTU IN ENDING ITS LITIGATION, AND PERHAPS VALUING IT POORLY OR LOWLY OR WHATEVER OR ACKNOWLEDGING THE LESS WORTH -- THE LACK OF WORTH --

MR. BARRETT: UH-HUH.

THE COURT: -- CAN'T THAT BE INFORMATION WHICH NOW CONNECTU WOULD BE DEPRIVED OF USING IN ARGUING ITS POSITION BEFORE THE NINTH CIRCUIT?

MR. BARRETT: WELL, YOUR HONOR, THAT IS I THINK THE DISTINCTION THAT THE CASES VERY CLEARLY MAKE AND TEKNI-PLEX IS PROBABLY THE LEADING CASE MAKING THE DISTINCTION BETWEEN THE SO-CALLED BUSINESS DOCUMENTS THAT ARE NEEDED FOR THE UPPER -- THE NORMAL BUSINESS OPERATIONS OF THE COMPANY VERSUS DOCUMENTS OR, I DON'T KNOW IF YOU'RE SUGGESTING TESTIMONY BY THE LAWYERS, BUT

INFORMATION THAT REALLY JUST RELATES TO THE DISPUTE BETWEEN THE PARTIES THAT IS IN LITIGATION.

AND IF YOU'RE TALKING ABOUT THE SORT OF BOOKS AND RECORDS AND THE NORMAL DAY-TO-DAY OPERATIONS OF THE COMPANY, THE CASES SEEM QUITE CLEAR THAT THOSE NEED TO BE TURNED OVER UPON REQUEST, WHICH AS I SAY WE DIDN'T REALLY HAVE HERE, TO THE NEW OWNERS.

IF YOU'RE TALKING ABOUT COUNSEL'S COMMUNICATIONS RELATING TO THE CONDUCT OR THE SETTLEMENT OF THE LITIGATION WITH THE FOUNDERS, THOSE MATERIALS DON'T GET TURNED OVER JUST LIKE THEY DIDN'T IN TEKNI-PLEX.

THE COURT: AND CONNECTU WOULD NOT BE ENTITLED TO THEM?

MR. BARRETT: THAT'S CORRECT, YOUR HONOR, BECAUSE OF THE INTEREST, AGAIN, THE ADVERSITY BETWEEN CONNECTU IN ITS NEW CAPACITY AND THE FOUNDERS.

AND AGAIN, THAT'S --

THE COURT: SO I NEED TO CREATE A RULE WHICH WILL ALLOW THE ATTORNEYS TO USE THAT INFORMATION OR SUPPRESS IT BECAUSE IT'S CONFIDENTIAL INFORMATION IN A WAY THAT MIGHT HARM THE ENTITY AND SUPPORT THE FOUNDERS BUT THAT WOULD

NOT BE -- SINCE CONNECTU CHOSE TO BE REPRESENTED BY THE SAME LAWYERS, IT CHOSE TO PUT ITSELF IN A POSITION WHERE THE LAWYERS COULD SUPPRESS THAT INFORMATION.

MR. BARRETT: I THINK AGAIN AT THE END OF THE DAY, THAT'S CORRECT, YOUR HONOR, AND I DON'T THINK YOU WOULD BE CREATING A RULE. I THINK YOU WOULD BE ENFORCING A RULE THAT HAS BEEN AROUND FOR QUITE SOME TIME.

THE COURT: ALL RIGHT. NOW, LET ME RESPECTFULLY SEE WHETHER OR NOT THE FACEBOOK WOULD WISH TO -- MR. CHATTERJEE WOULD BRIEFLY WISH TO ADDRESS THIS.

MR. CHATTERJEE: I'LL BE EFFICIENT, YOUR HONOR. FIRST THING IS I WANT TO CONGRATULATE YOUR LAW CLERKS IF THAT'S ALL RIGHT OF BEING SWORN IN. I HAD THE HONOR OF DOING THAT 15 YEARS AGO ALMOST TO THE DAY RIGHT DOWN THE HALL. IT'S REALLY A GREAT THING.

THANK YOU FOR GIVING US THE TIME THIS MORNING.

AND I WANT TO READ THE PARAGRAPH FROM EXHIBIT G TO THE TOWERY DECLARATION. THIS IS THE LETTER THAT MR. UNDERHILL SENT CONNECTU.

AND I HEARD WHAT MR. BARRETT SAID THE

LETTER SAID, BUT I THINK READING THE ACTUAL TEXT OF IT IS HELPFUL.

THE VERY LAST PARAGRAPH THE LETTER READS AS FOLLOWS: "FINALLY, ON BEHALF OF THE FOUNDERS, WE REQUEST THAT CONNECTU NOT TAKE ANY ACTION THAT WOULD INTERFERE WITH THE PENDING APPEAL. AS YOU'RE PROBABLY AWARE, CONNECTU OWES SUBSTANTIAL DEBTS TO THE FOUNDERS," THAT'S WHAT YOUR HONOR'S QUESTIONS WERE REALLY DIRECTED AT, "AND CONNECTU'S MOST SIGNIFICANT ASSETS ARE ITS CLAIMS AGAINST FACEBOOK AND PERSONS ASSOCIATED WITH FACEBOOK. CONSEQUENTLY, WE BELIEVE THAT ANY ATTEMPT BY CONNECTU TO BENEFIT ITS CURRENT SHAREHOLDER BY DISTINGUISHING THAT CLAIM WOULD BE A FRAUDULENT CONVEYANCE AND LEGALLY ACTIONABLE."

YOUR HONOR, I'LL SUBMIT TO YOU THAT A LAW FIRM THAT HAS A CLIENT LIKE CONNECTU SENDING A LETTER LIKE THIS TO THEIR CLIENT IS A DIRECT CONFLICT.

THERE CAN BE NO QUESTION HERE WHEN THEY SAY, "AND LEGALLY ACTIONABLE," THEY'RE NOT MAKING A THREAT. AND THE THREAT ISN'T JUST ABOUT THE DEBTS. IT'S ABOUT IF YOU, CONNECTU, TRY AND DISMISS THIS APPEAL, WE ARE GOING TO SUE YOU. THIS IS A DIRECT CONFLICT.

NOW, YOUR HONOR ASKS A COUPLE OF QUESTIONS WHICH I THINK ARE PARTICULARLY IMPORTANT.

ONE OF THE QUESTIONS WAS ARE THEY IN POSSESSION OF A CONFIDENTIAL INFORMATION THAT COULD AFFECT THEIR ABILITY TO DO WHAT THEY'RE DOING IN ONE WAY OR ANOTHER?

IN A NUTSHELL, THAT'S HOW I WOULD SUMMARIZE IT.

IT'S HARD TO READ THIS PARAGRAPH AND BELIEVE THAT THE BOIES, SCHILLER FIRM DOESN'T UNDERSTAND THINGS ABOUT THE CLAIMS AGAINST FACEBOOK AND THE PERSONS ASSOCIATED WITH FACEBOOK THAT ARE RAISED BY CONNECTU THAT WOULDN'T IMPACT THEIR ABILITY TO MAKE THIS ASSERTION.

THEY MAY STAND HERE TODAY AND SAY IT EITHER SUPPORTS OR NEGATES IT. I'M SURE THEY WOULD SAY IT SUPPORTS THE FACT THAT CONNECTU HAS A CLAIM AGAINST FACEBOOK, BUT THAT INFORMATION, THE CONFIDENTIAL INFORMATION, THE RISK AND BENEFIT AND ANALYSIS, THE PLUSES AND MINUSES, THAT IS INFORMATION IN THEIR POSSESSION.

IN LISTENING TO MR. BARRETT'S ARGUMENT, I HEARD A DISTINCTION THAT I THINK REALLY GOES TO THE PUBLIC CONFIDENCE ISSUE YOUR HONOR RAISED BECAUSE THE PREMISE OF THEIR ARGUMENT IS THAT THE INTEREST

ATTACHES TO THE LEGAL ARGUMENT AND NOT TO THE CLIENT THAT THEY'RE REPRESENTING.

ESSENTIALLY IN A NUTSHELL THAT'S WHAT THEY'RE SAYING, IS THAT AS LONG AS THERE'S A PARTICULAR POSITION THAT IS BEING ADVOCATED BY SOMEBODY, ALL OF THE CLIENTS WHO DON'T SHARE THAT VIEW, WHO, IN FACT, MAY BE VIEW THE EXACT OPPOSITE DURING THE LITIGATION THAT THEY MAY REPRESENT CAN GET PARED AWAY AND THEY CAN CONTINUE TO REPRESENT A PARTICULAR LEGAL IDEA OR STRATEGY AS OPPOSED TO HAVING THE OBLIGATION OF LOYALTY TO THEIR CLIENT.

IF THAT PREMISE WERE ACCEPTED AS ACCURATE, THE CONFIDENCE IN ATTORNEYS AND THEIR ETHICAL OBLIGATIONS WOULD COLLAPSE. WE DON'T REPRESENT A LEGAL ARGUMENT. WE REPRESENT CLIENTS, AND THAT DUTY OF LOYALTY IS IMPORTANT.

A FINAL POINT, YOUR HONOR -- WELL, I'LL MAKE TWO FINAL POINTS AND THEN I DON'T WANT TO SPEND ANY MORE TIME.

I THINK THERE IS SOME CONFUSION IN THE ARGUMENTS THAT I WANT TO NARROW THINGS DOWN TO. THERE'S A BUNCH OF DISCUSSION ABOUT THE LEGAL MERITS OF THE APPEAL. I THINK YOUR HONOR USED THE WORD "INCHOATE." I THINK THAT NEEDS TO BE DIVORCED FROM WHAT A LAWYERS ETHICAL OBLIGATIONS ARE.

BECAUSE WHETHER THEY SUCCEED OR DON'T SUCCEED IN THE APPEAL IS NOT OF CONFIDENCE WHEN WE'RE TALKING -- AND, IN FACT, THE NINTH CIRCUIT ACKNOWLEDGED THAT THIS FACT BE RAISED AS PART OF THE NINTH CIRCUIT APPELLATE READING. AND THEY SENT IT DOWN HERE FOR YOUR HONOR TO EVALUATE IT.

THE LAWYER'S ETHICAL OBLIGATIONS IS A SEPARATE ISSUE. CONNECTU'S FOUNDERS ARE MORE THAN ABLE TO HIRE VERY HIGHLY SKILLED LAWYERS. LET'S TAKE A LOOK AT THE ROSTER. WE HAD QUINN, EMANUEL; WE HAD FINNEGAN, HENDERSON; WE HAD BOIES, SCHILLER; WE HAD JONES DAY; AND THE O'SHEA FIRM. ALL OF THOSE FIRMS ARE HIGHLY REGARDED MULTINATIONAL FIRMS IN SOME CASES AND WORLD CLASS FIRMS IN OTHER CASES. THEY KNOW HOW TO HIRE THEIR LAWYERS.

AND THEY ALL JOINED AT VARIOUS POINTS IN TIME. THE FINNEGAN, HENDERSON WAS IN THE CASE IN THE BEGINNING; QUINN, EMANUEL REPLACED THEM AND THEY'RE CURRENTLY IN LITIGATION WITH THE FOUNDERS.

THE BOIES, SCHILLER FIRM DID NOT SHOW UP IN THIS CASE UNTIL THE MOTION TO ENFORCEMENT PROCEEDINGS BEGAN. THE JONES DAY WAS DOING CORPORATE WORK. THESE ARE ALL PEOPLE WHO JOINED THE CASE AT DIFFERENT POINTS IN TIME.

FOR CONNECTU FOUNDERS TO COME IN HERE NOW

TO SAY, OH, WE'RE SUFFERING PREJUDICE BECAUSE WE HAVE TO GET OUR LAWYERS REPLACED IS SOMEWHAT ABSURD BECAUSE THEY'VE BEEN DOING THAT ALL ALONG THROUGHOUT THE CASE.

THE FINAL POINT I WANT TO MAKE GOES BACK TO THE POINT I WAS MAKING AT THE VERY BEGINNING ABOUT THE SETTLEMENT AGREEMENT.

IF YOU WERE TO ACCEPT THE PREMISE AS TRUE THAT CONNECTU'S MOST SIGNIFICANT ASSET ARE THE CLAIMS AGAINST FACEBOOK, AND YOU ALLOWED LAWYERS TO CONTINUE TO ACT ON BEHALF OF THE FOUNDERS AND NOT ON BEHALF OF CONNECTU, YOU WOULD ACTUALLY BE FRUSTRATING THE ENFORCEMENT OF THE SETTLEMENT AGREEMENT ITSELF BECAUSE WHEN FACEBOOK PURCHASED CONNECTU, IT HAD AN EXPECTATION AND WAS, IN FACT, VALIDATED BY THIS COURT THAT IT WOULD HAVE ALL OF ITS RIGHTS TO BE ABLE TO OPERATE THE BUSINESS AND DO WHATEVER IT FELT WAS NECESSARY IN CONTINUING THE BUSINESS.

IF THE DUTY OF LOYALTY THAT THE BOIES, SCHILLER FIRM THAT FINNEGAN, HENDERSON AND THE OTHER FIRMS WERE ALLOWED TO BE VITIATED WHERE WE WOULD HAVE A FIRST RECOGNIZED EXCEPTION TO A RULE OF PROFESSION AL CONDUCT THAT HAS NEVER BEEN RECOGNIZED BEFORE, A SUBSTANTIAL RIGHT THAT WAS

ACHIEVED BY ENFORCING THE SETTLEMENT AGREEMENT WOULD BE FRUSTRATED.

IN OTHER WORDS, YOUR HONOR, YOUR HONOR WOULD NOT HONOR THE SETTLEMENT AGREEMENT ITSELF.

WELL, I -- THAT'S WHY, AND YOU'RE RIGHT, IT IS COMPLICATED BY THE FACT THAT THE APPEAL IS FROM THE SETTLEMENT AGREEMENT.

THIS IS NOT A POST-SETTLEMENT DISPUTE. THIS IS NOT ACTUALLY A POST-EXECUTION DISPUTE.

THIS IS A DISPUTE WHICH IS PART OF THE CASE THAT WAS HEARD BY THE COURT AND THE APPEAL IS FROM THAT CASE.

SO I WOULD -- I WOULD BE FAR MORE COMFORTABLE IN A SITUATION WHERE WE WERE TWO YEARS DOWN THE ROAD AND SOME DISPUTE HAD DEVELOPED WITH RESPECT TO THIS PRIOR TRANSACTION AND IN SORTING OUT THE RELATIONSHIPS OF THE PARTIES.

THIS CASE PRESENTS THE UNIQUE SITUATION THAT A MOTION TO DISQUALIFY IS MADE DURING THE LITIGATION.

AND THAT'S WHY I'VE BEEN LOOKING FOR CASES TO HELP ME.

YOU STATE THE RULE. WHAT IS THE RULE THAT YOU WOULD HAVE THE COURT ADOPT AS THE PROPHYLACTIC RULE THAT WOULD AVOID THIS

CIRCUMSTANCE OR CURE IT?

MR. CHATTERJEE: YOUR HONOR, I THINK MR. TOWERY STATED THE RULE CORRECTLY. I THINK IT IS A SOMEWHAT ABSOLUTE RULE.

UNLESS THERE'S SOMETHING THAT COMES IN THAT DEMONSTRATES A KNOWING AND VOLUNTARY RELINQUISHMENT OF A KNOWN RIGHT BY THE VARIOUS AFFECTED PARTIES, I THINK IT IS A PRETTY BRIGHT LINE RULE.

AND I THINK IT'S THAT BECAUSE OF THE PUBLIC CONFIDENCE ISSUES AND BECAUSE OF THE ETHICAL STANDARDS THAT THE COURT AND THE STATE BAR HOLDS US TO. I THINK IT HAS TO BE THAT WAY.

NOW, I DID HEAR MR. BARRETT TALK ABOUT AN ISSUE OF COMMON INTEREST REPRESENTATION WHERE YOU HAVE MANY LAW FIRMS REPRESENTING MANY PEOPLE ALIGNED. YOUR HONOR IS FAMILIAR WITH THOSE KIND OF JOINT DEFENSE ARRANGEMENTS WHERE THERE ARE ACTUALLY WRITTEN JOINT AGREEMENTS BETWEEN THE PARTIES SAYING THAT WE EACH REPRESENT AN INDIVIDUALS -- A DIFFERENT DEFENDANT'S INDIVIDUAL INTERESTS, BUT WE DON'T REPRESENT THE OTHER DEFENDANTS.

THAT IS NOT THE SITUATION HERE. THEY CHOSE TO HAVE SINGLE REPRESENTATION AND THE CONSEQUENCES THAT WOULD FLOW FROM THAT.

THE COURT: NOW, THIS JUST OCCURRED TO ME AND IT'S ALWAYS DANGEROUS FOR ME TO SPEAK ABOUT THINGS THAT JUST OCCUR TO ME, BUT I WAS JUST THINKING THAT IF THE MOTION BY NEW CONNECTU TO DISMISS ITS APPEAL IS GRANTED, DOESN'T THAT SOLVE THE PROBLEM?

IN OTHER WORDS, THEN AGAIN IT WOULD BE REDUCED TO A CASE WHERE THE ONLY PARTIES TO THE APPEAL WOULD BE THE FOUNDERS AND THE FACEBOOK.

MR. CHATTERJEE: I DON'T THINK THAT WILL NECESSARILY RESOLVE IT, YOUR HONOR. THERE ARE UNANTICIPATED CONSEQUENCES THAT WOULD HAPPEN HERE.

CONNECTU IS ALLOWED TO ASK THEIR FORMER LAWYERS NOT TO PURSUE AN APPEAL THAT IS ADVERSE TO THEIR INTEREST. THEY ARE AND, IN FACT, THEY DID DO THAT. THEY ARE A PARTY TO THE CASE.

THE COURT: AND ONCE THAT HAS BEEN OBVIATED BY A RULING ON THIS PENDING MOTION THAT DISMISSES THE APPEAL, I PRESUME THAT THAT WOULD CARRY WITH IT ANY CROSS-APPEALS THAT CONNECTU MIGHT HAVE FILED.

I ASKED FOR A BRIEFING ON WHAT THE VARIOUS LITIGATIONS WERE AND I HAVEN'T STUDIED THAT YET, BUT I WILL.

BUT I DON'T UNDERSTAND WHAT WOULD BE THE

ADVERSITY REMAINING ONCE CONNECTU HAS BEEN DISMISSED FROM THE APPEAL.

MR. CHATTERJEE: YOUR HONOR, AND I THINK THIS IS A VERY IMPORTANT QUESTION AND WHY I WAS DRAWING THE DISTINCTION BETWEEN THE MERITS TO THE LITIGATION AND THE ETHICAL RULES.

WHETHER OR NOT CONNECTU IS A PARTY IN THIS CASE OR NOT, THE FACT OF THE MATTER IS THAT THE BOIES, SCHILLER FIRM IS GOING TO -- AS LONG AS THEY STAY IN THIS CASE, IS GOING TO TAKE A POSITION AND IS MAINTAINING A POSITION NOW THAT IS IN DIRECT CONFLICT TO THEIR FORMER CLIENT CONNECTU.

CONNECTU EVEN HAS THE RIGHT TO INTERVENE IN THE CASE IF THEY ARE DISMISSED AND SEEK TO DISQUALIFY BECAUSE THE DUTIES OF LOYALTY ARE NOT ABOUT WHO ARE ON WHAT SIDES OF THE V, IT'S WHETHER YOU HAVE TWO CLIENTS THAT HAVE DIFFERENT INTERESTS WHERE YOU'RE ADVOCATING SOMETHING THAT AFFECTS THEIR INTERESTS IN DIFFERENT WAYS.

THE COURT: WELL, THEY WOULD NEED TO INTERVENE IF THEY TRIED TO GET OUT AND GET BACK IN.

MR. CHATTERJEE: THEY COULD INTERVENE FOR THE LIMITED PURPOSES OF DISQUALIFYING THE BOIES, SCHILLER FIRM AND THAT WOULD CERTAINLY BE ALLOWED.

THE COURT: I UNDERSTAND YOUR POSITION.

MR. TOWERY, ANY LAST WORDS AS THE MOVING PARTY?

MR. TOWERY: I HAVE THREE POINTS AND IF YOU'LL INDULGE ME I HOPE I CAN MAKE THEM IN ABOUT TWO MINUTES.

FIRST OF ALL, THE COURT ASKED OPPOSING COUNSEL WHAT THEIR POSITION WAS ON THE MOTION TO DISMISS AND YOU HAVE GOT A LONG ANSWER, BUT LET ME READ TO YOU FROM THEIR RESPONSE TO THE MOTION TO DISMISS. THIS IS EXHIBIT C TO MR. PARK'S DECLARATION AT PAGE 2.

"IF THIS PANEL DOES DECIDE TO ADDRESS FACEBOOK'S MOTION TO DISMISS CONNECTU'S APPEAL, THE COURT SHOULD DENY THE MOTION BECAUSE DISMISSAL WOULD BE UNJUSTLY FACEBOOK'S ATTEMPTS TO MANIPULATE PROCEEDINGS."

I'M SORRY. AS I'M READING THIS NOW, I'M APPRECIATING THAT THIS IS NOT THE CORRECT DOCUMENT, BUT I BELIEVE THAT IF THE COURT GOES BACK AND LOOKS AT THEIR RESPONSE, THEY OPPOSED CONNECTU'S MOTION TO DISMISS THE APPEAL ON THE MERITS. I DON'T THINK IT WAS AS EQUIVOCAL AS MR. BARRETT SAID.

SECONDLY, THERE'S BEEN DISCUSSION ABOUT MR. UNDERHILL'S THREAT AND YOU'VE BEEN REFERRED TO HIS LETTER OF DECEMBER 18TH, WHERE HE MADE THE

THREAT THAT MR. CHATTERJEE JUST READ.

I WOULD ALSO LIKE THE COURT TO BE MINDFUL OF WHAT HE SAID FOUR DAYS LATER ON DECEMBER 22ND, WHEN HE SENT A SUPPLEMENTAL E-MAIL TO ME, AND THIS IS EXHIBIT K TO MY DECLARATION IN SUPPORT OF THE MOTION TO DISQUALIFY WHERE HE SAYS THAT THE BEGINNING OF THE LETTER SAYS, "OUR FIRM WILL STIPULATE TO THE PROPOSED SUBSTITUTION OF COUNSEL FOR CONNECTU IF THE FACEBOOK, INC., AND CONNECTU AGREE TO COMPLETELY INDEMNIFY BSF FROM ANY LIABILITIES ARISING FROM OR RELATING TO SUCH REPRESENTATION."

AND THEN HE GOES ON AT THE END OF THE LETTER, "PLEASE CONFIRM THAT CONNECTU WILL NOT TAKE ANY ACTIONS TO INTERFERE WITH THE PENDING APPEAL."

WHAT IS GOING ON THERE IS THAT HE'S TRYING TO PROTECT THE LAW FIRM AND MAKING AN ADDITIONAL IMPLICIT THREAT AGAINST CONNECTU THAT IF CONNECTU DOES TAKE ISSUE THAT AFFECTS THE APPEAL OF THE FOUNDERS, THEN BOIES, SCHILLER MAY HAVE CLAIMS OVER AGAINST CONNECTU.

I MEAN, AGAIN, IT IS A CLASSIC ILLUSTRATION OF WHAT THE ADVERSITY IS.

THE THIRD AND FINAL POINT I WANT TO MAKE IS THAT I HAD NOT BEEN ABLE TO RECALL THE NAME OF

THE CALIFORNIA CASE WHERE THERE WAS AN ANTICIPATION OF THIS KIND OF CONFLICT.

THE NAME OF THAT CASE, YOUR HONOR, IS ZABOR VERSUS SUPERIOR COURT, Z-A-B-O-R.

AND IN SHORT WHAT THAT CASE INVOLVED IS A LAW FIRM AGREED TO REPRESENT A PRINCIPAL AND AN AGENT, THEIR PURSUIT. AND ACTUAL ADVERSITY LATER DEVELOPED BETWEEN THE PRINCIPAL AND THE AGENT AND THE LAW FIRM SOUGHT TO AND DID WITHDRAW FROM REPRESENTING THE AGENT BUT CONTINUED TO REPRESENT THE PRINCIPAL.

THE AGENT THEN BROUGHT A DQ MOTION AGAINST THE LAW FIRM AND SAID THAT WE'RE FORMER JOINT CLIENTS. YOU REPRESENTED BOTH OF US. YOU NOW CAN'T CONTINUE TO REPRESENT ONE NOW THAT YOU'RE NO LONGER REPRESENTING ME.

THE COURT DENIED THE MOTION TO DISQUALIFY BASED ON SPECIFIC LANGUAGE IN THE FEE AGREEMENT THAT IT QUOTED APPROVINGLY IN A FOOTNOTE THAT SAID TO BOTH JOINT CLIENTS AT THE BEGINNING IF A CONFLICT DEVELOPS IN THE FUTURE, BOTH SIDES ACQUIESCE THAT WE CAN CONTINUE TO REPRESENT THE PRINCIPAL.

IN SHORT, YOUR QUESTION ABOUT WHAT HAPPENS WHEN COUNSEL BEGAN REPRESENTING JOINT

CLIENTS AND WHAT THE RAMIFICATIONS OF THAT ARE IS ANSWERED IN PART BY SAYING, COUNSEL CAN ANTICIPATE THAT AND COUNSEL CAN GET WRITTEN CONSENT FROM THEIR CLIENTS IN ADVANCE AS TO THEIR ABILITY TO CONTINUE TO REPRESENT ONE OF THE FORMER JOINT CLIENTS.

OBVIOUSLY WE HAVE NO EVIDENCE IN THIS CASE THAT THERE WAS ANY SUCH AGREEMENT.

THE BURDEN WOULD BE OBVIOUSLY ON THE FOUNDERS TO COME FORWARD IF SUCH AN AGREEMENT EXISTED.

THEY HAVEN'T. I THINK THE CLEAR INFERENCE CAN BE DRAWN.

ABSENT SUCH AN AGREEMENT, THEN I RESPECTFULLY SUBMIT THE LINE HAS TO BE THE BRIGHT LINE RULE THAT WE HAVE SUBMITTED TO THE COURT.

IF YOU START OUT REPRESENTING JOINT CLIENTS AND ADVERSITY DEVELOPS BETWEEN THEM, THE NECESSARY COROLLARY OF THAT IS THAT YOU MAY NOT THEN REPRESENT ONE CLIENT AGAINST ANOTHER FORMER JOINT CLIENT. IT'S JUST IMPERMISSIBLE AND SHOULDN'T BE ALLOWED TO EXIST.

I HOPE THE COURT DOES NOT MAKE THAT INTERIM.

THANK YOU FOR YOUR ATTENTION, YOUR HONOR.

THE COURT: VERY WELL.

MR. BARRETT: I COULD SAY A WORD OR TWO ABOUT HIS COMMENTS, YOUR HONOR, BUT I DON'T WANT TO -- I'D BE HAPPY TO.

THE COURT: WELL, I DON'T WANT YOU TO FEEL DEPRIVED BECAUSE I WILL TAKE THIS UNDER SUBMISSION. IF THERE IS A FEW WORDS, I'LL GIVE YOU THE COURTESY.

MR. BARRETT: IT IS, YOUR HONOR. WITH RESPECT TO MR. UNDERHILL'S COMMUNICATIONS, YOUR HONOR, I THINK THE BOTTOM LINE ON THOSE IS THAT ALL OF THAT IS -- YOU KNOW, FLOWS NATURALLY AND UNDERSTANDABLY FROM THE ORIGINAL ADVERSITY BETWEEN FACEBOOK AND THE FOUNDERS AND THIS SWITCH IN POSITION BY CONNECTU.

AND WHILE IT'S COLORFUL, AND I THINK THAT'S WHY COUNSEL IS MAKING SUCH A BIG DEAL OF IT, I DON'T THINK IT CHANGES THE ANALYSIS UNDER THE CASES THAT WE HAVE BEEN DISCUSSING WHERE YOU HAVE THE JOINT REPRESENTATION SITUATION TO START WITH.

WITH RESPECT TO THE LAST POINT ABOUT THE RETAINER AGREEMENT, YOUR HONOR, THAT'S ONE THING WHEN YOU'RE TALKING ABOUT A PRINCIPAL AND AN AGENT, TWO SEPARATE ECONOMIC ENTITIES WHO GOING INTO THE RELATIONSHIP WITH THE LAWYERS CLEARLY HAVE COMPLETELY SEPARATE LIVES, THEY'RE COMING TOGETHER

FOR A JOINT PURPOSE AND SO ON.

THAT'S DIFFERENT FROM THE SITUATION THAT WE HAVE HERE, AND AGAIN, AS BOTH SIDES HAVE SAID I THINK YOU HAVE TO TAKE ALL OF THE CIRCUMSTANCES INTO CONSIDERATION WHERE YOU HAVE A CLOSE CORPORATION THAT ONLY CAME INTO EXISTENCE AS A VEHICLE FOR THE FOUNDERS TO IMPLEMENT THEIR OWN INTERESTS AND NOW BECAUSE OF THE OPERATION OF THE LAW AND THE TRANSACTION THAT THE PARTIES CONTEMPLATED, THAT VEHICLE ALSO INVOLUNTARILY AS TO THE FOUNDERS IS BY OPERATION OF LAW MOVED TO THE OTHER SIDE OF THE TABLE AND IF THE APPEAL IS SUCCESSFUL, IT COULD VERY WELL BE MOVED BACK AS YOUR HONOR HAS POINTED OUT.

THE COURT: WELL, I APPRECIATE YOUR ARGUMENT ON BOTH SIDES. AND I WILL TRY AND GIVE YOU A WRITTEN DECISION EXPEDITIOUSLY BECAUSE I AM HEARING THAT THIS -- AND I CAN UNDERSTAND THIS HAS SLOWED THE APPEAL PROCESS.

I ACTUALLY APPRECIATE THE REFERRAL OF THIS MATTER BACK TO THIS COURT TO TAKE NEITHER -- TO TAKE A LOOK AT THIS QUESTION BECAUSE IT DOES INVOLVE AREAS THAT WERE NOT THE SUBJECT OF ANY CONSIDERATION GIVEN BY THE COURT PREVIOUSLY.

IT DOES SEEM TO ME THAT PART OF WHAT

WE'RE STRUGGLING WITH HERE IS SOMETHING THAT, AS I SAID, WE HAVE TO DIVORCE FROM THE MERITS OF THE CASE BECAUSE AS LAWYERS AND AS THE COURT, WE OWE A HIGHER DUTY THAN UNDER ANY OTHER CIRCUMSTANCE.

THE ETHICAL RULES ARE THERE EVEN IN CIRCUMSTANCES WHERE THE INTEREST OF CLIENTS ARE HARMED. IT'S THE PUBLIC INTERESTS THAT REIGN SUPREME WITH RESPECT TO THESE MATTERS.

AT THE SAME TIME, I'VE READ A NUMBER OF CASES WHERE COURTS ARE CAUTIOUS ABOUT DISQUALIFICATION MOTIONS BECAUSE IT CAN VISIT ECONOMIC HARM ON A PARTY. IT CAN CAUSE DELAY IN LITIGATION AND SO PRACTICAL CONSIDERATIONS ARE IMPORTANT.

ONE OF THE REASONS THIS PROBLEM IS A LITTLE MORE VEXING THAN OTHERS IS BECAUSE OF THE NATURE OF CONNECTU. FOR A WHILE IT WAS A LIMITED LIABILITY COMPANY AND THEN IT BECAME A CLOSE CORPORATION.

AND AS COUNSEL HAS ARGUED, ITS DECISION AND ITS CONDUCT ARE REALLY THE CONDUCT OF THE PRINCIPAL SHAREHOLDERS WHO CONTROL THE COMPANY.

BUT IT HAS A LEGAL EXISTENCE. IT CHOSE TO DO BUSINESS IN A CORPORATE FORUM, AND SO IT AS A CLIENT NEEDS TO HAVE ITS RIGHTS RESPECTED AND THOSE

WHO CHOOSE TO DO BUSINESS IN THE CORPORATE FORUM AND TO HAVE ATTORNEY-CLIENT RELATIONSHIPS SHOULD HAVE CLEAR LAWS WITH RESPECT TO WHAT THOSE LAWYERS DUTIES ARE WITH RESPECT TO THE CORPORATE ENTITY BEFORE AND AFTER TRANSACTIONS OF THIS KIND. AND I WILL DO MY BEST TO ARTICULATE WHAT RULE THIS COURT ADOPTS WITH RESPECT TO THE CIRCUMSTANCES OF THIS CASE.

I AM SOMEWHAT FRUSTRATED THAT I DON'T KNOW THE SIGNIFICANCE OF THE DEBT BECAUSE IT SEEMS TO ME THAT THE LETTER DESCRIBES IT IN TERMS THAT MIGHT PLAY A PART, AND I WILL ASK FOR SUPPLEMENTAL BRIEFING FROM THE PARTIES AS TO THE AMOUNT OF THAT DEBT AND IT SOUNDS TO ME AS THOUGH THE REPRESENTATION OF IT WAS DISCLOSED DURING THE COURSE OF THE RESOLUTION OF THE CASE SO -- AND THAT IT WAS NO SURPRISE, ALTHOUGH THERE WAS SOME SURPRISE THAT I PICKED UP IN THE CORRESPONDENCE BUT THAT MIGHT HAVE BEEN A SURPRISE TO MR. TOWERY AS NEW LAWYERS AS OPPOSED TO A SURPRISE TO FACEBOOK.

BUT I WOULD LIKE TO KNOW THE SIGNIFICANCE OF IT BECAUSE EVEN THOUGH IT IS NOT A DIRECT ISSUE ON THE APPEAL, IT THREATENS TO BECOME AN IMPORTANT ISSUE AND IT'S THAT POTENTIAL AS WELL AS THE ACTUAL ISSUE THAT I HAVE TO PAY ATTENTION TO WITH RESPECT

TO THIS MOTION. EXCEPT FOR ANY MATERIAL LIKE THAT THAT I ASK YOU TO GIVE ME, I'LL TAKE THIS MATTER UNDER SUBMISSION.

I REALLY APPRECIATE YOUR TAKING THE TIME TO ADDRESS THESE MATTERS AND IN PAPERS AS WELL AS BEING HERE TODAY.

MR. BARRETT: SHOULD WE PROVIDE SUCH A SUPPLEMENT?

THE COURT: I'LL HAVE MY LAW CLERK DISCUSS THAT WITH YOU.

MR. BARRETT: THANK YOU.

MR. TOWERY: THANK YOU, YOUR HONOR.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)